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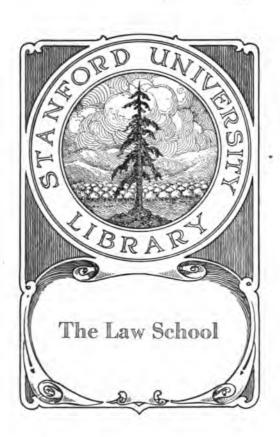
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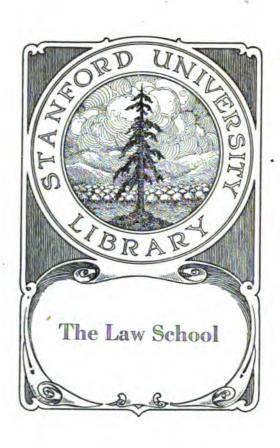
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REPORTS

OF

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

COURTS OF KING'S BENCH AND COMMON PLEAS,

AND ON

THE CIRCUIT:

FROM THE ATTTINGS IN MICHAELMAS TERM, 1823, TO THE SITTINGS AFTER HILARY TERM, 1825.

BY

F. A. CARRINGTON AND J. PAYNE, Esques.,

OF LINCOLM'S INN, BARRISTERS AT LAW.

VOLUME I.

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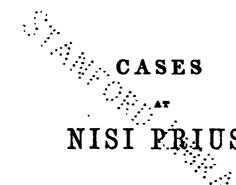
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COURT OF KING'S BENCH,

SITTINGS AT MICHAELMAS TERM, 1823.

BEFORE LORD CHIEF JUSTICE ABBOTT.

BLACKBURN v. MACKEY.

A father is not liable to pay for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied.

This was an action of assumpsit, brought by the plaintiff, a tailor, against the defendant, for clothes furnished to the defendant's son, Patrick Mackey. Plea—General issue.

The plaintiff's counsel calling Patrick Mackey, he on voir dire stated that the clothes were supplied to him, he being then under age, (though now of age.)

He was then released by the plaintiff.

In his examination in chief he stated, that the clothes in question were supplied to him by the plaintiff, that he had no means of paying for them, nor any allowance from his father; but he was at that time a writing clerk to Mr. Goren, an attorney in London, his father being a surgeon in Essex; his father did not supply him with any clothes. Mr. Goren paid him a guinea a-week.

In cross examination he stated, that the defendant did not know the plaintiff,

and he proved the defendant's handwriting to a letter.

The plaintiff's son proved clothes delivered at one time to the amount of 71. 8s. 6d.; at another time to the amount of 6l. 6s.

The person at whose house Patrick Mackey lodged in London proved that he was in great want of clothes.

The letter from the defendant to the plaintiff was put in. It was to the effect fellowing....

«SIR,

"I am very much surprised that you have suffered yourself to be

imposed on a second time by that youth. Know then that I do not pay bills for him. If I had known your address, I would have given you this notice earlier. If you lose by him you have only yourself to thank, you had no need to have let him have your goods. However, I have no great objection to paying your first bill, if you will send a friend with a receipt, for I do not send money by letter. I remain, &c., &c."

Robinson, for the defendant, contended that there was not the slightest promise to pay by the father, and this was not the case of a son living in his father's house; the father did not know of the supply of the goods, and in fact the son was emancipated, and earning a guinea a-week. As to the letter, the promise there, if any, was only conditional, and the condition had not been

performed,

ABBOTT, C. J. This is an action for clothes furnished by the plaintiff to the defendant's son, a writing clerk to an attorney. The question deeply affects society; for if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man who had a family might be ruined. A father is not bound to pay for articles ordered by his son, unless the father gives some authority, express or implied. Here no such authority appears, except it is given by the letter; which, however, can only apply to the first account 71. 8s. 6d. His lordship read the letter, and said, that if the jury thought that the offer of payment at the end of it only meant, send a receipt for the first bill, and I will pay that, to hear no more of the business, they ought to find for the defendant; but if they thought it meant to admit an original liability, they should find for the plaintiff for the first bill.

Verdict for the plaintiff for 71. 8s. 6d.

Scarlett and Godson for the plaintiff.
Rouinson for the defendant.

[Attornies—Goren and Bromley.]

See Fluck v. Tollemache, infra.

COURT OF COMMON PLEAS.

SITTINGS AFTER MICHAELMAS TERM, LONDON.

BEFORE MR. JUSTICE BURROUGH.

BARRET and Wife, Executor and Executrix of Cuppage, v. MOSS.

The executor of an attorney suing for an attorney's bill, due to the deceased, need not deliver it a month before bringing an action for it.

THE testator had been an attorney, and in his lifetime had done business as such, for the defendant. The present action was to recover the amount of the bill.

•5]

One of the testator's clerks proved that the business had been done, and that the charges were fair and reasonable.

*Vaughan, Serjt., objected that there was no evidence that the bill had been delivered under the statute.

Onslow, Serit. The statute enacts that no Attorney shall sue for his bill, &c., without having delivered it a month, but that does not apply to his executors, they sue as in other cases.

BURROUGH, J. I think my brother Onslow is right, the act only applies to the attorney himself suing, and not to the executor of an attorney. There must be a verdict for the plaintiffs.

Verdict for the plaintiffs.

Onslow, Serjt., for the plaintiffs. Vaughan, Serit., for the defendant.

[Attornies—Cousins and Downes.]

The statute 2 Geo. 2. c. 23. s. 23. which is entitled "an act for the better regulation of Attornies and Solicitors;" enacts that, No Attorney or Solicitor of any of the courts aforesaid, [the four superior courts] shall commence or maintain any action or suit at law, or in equity, until the expiration of one month or more after such attorney or solicitor shall

or in equity, until the expiration of one monit or more after such attorney or solution status have delivered to the party. &c., or left for him. &c. a bill of such fees, charges. &c.; which bill shall be subscribed with the proper hand of such attorney or solicitor respectively." The whole of this clause plainty points at the attorney himself suing, and not his executor. The signing of the bill by the attorney being required, is conclusive that the legislature could not mean to extend the law to an executor suing; for if the law extended to him, he could never recover, as he could never comply with this requisite.

But the case of Penson, Executivix. V. Johnson, 4 Taunt. 724, decides that an attorney's hill to be a secutive to the person who sued on it and the

bill is open to taxation, though his executrix was the person who sued on it, and the defendant may apply to have it taxed before he appears in the action that the attorney's executrix has brought against him.

Executive has brought against him.

In Comb. 348, it is laid down, that, where an executor of an attorney sued for fees, the court held that it was not necessary to have the bill signed.

This was before the passing of the last act, and applies only to the statute of 3 Jac.

1. c. 7. under which attornies were obliged to deliver their bills, "subscribed with their seen hand and name." And the case of Weston v. Pool. 2 Str. 1056, which was after the passing of the act of Geo. 2, decides that, if after an attorney's death a sixth of his bill is taken off on taxation, his executor shall not pay the costs.

*FLUCK v. TOLLEMACHE.

A father is not bound to pay for clothes, furnished to his son, without some contract, express or implied, on his part to do so.

This was an action of assumpsit for clothes supplied to the defendant's son, who was a cadet at Wcolwich.

The evidence for the plaintiff proved the delivery of the clothes to the son at Woolwich, but that the defendant lived near Uxbridge, and the only evidence to connect the defendant with the transaction, was a letter which he had sent to the plaintiff's attorney.

It stated that he had ordered no goods of the plaintiff, and would not pay for any supplied to his son; and that if the plaintiff lost money by allowing a boy

of fifteen to run up a bill, he could only blame himself.

BURROUGH, J. An action can only be maintained against a person for clothes supplied to his son, either when he has ordered such clothes, and contracted to pay for them; or when they have been at first furnished without his knowledge, and he has adopted the contract afterwards: such adoption may be interred from his seeing his son wear the clothes, and not returning them, or making at, or soon after the time, when he knows of their being supplied, some objection. Here the only knowledge that it appeared the defendant had of the transaction, was being asked for the money, he then repudiated the contract altogether. It would be rather too much, that parents should be compellable to pay for goods that any tradesman may, without their knowledge, improvidently trust their sons with. His Lordship then directed a

Verdict for the defendant.

*Vaughan, Serjt., and Cresswell, for the plaintiff. Pell, Serjt., for the defendant.

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[Attornies—Dendy and Bell.]

SITTINGS AFTER MICHAELMAS TERM, AT WESTMINSTER.

BEFORE MR. JUSTICE PARK.

TULLAY v. REED.

If a person enter a house, with force and violence, the person whose house is entered may justify turning him out, (using no more force than is necessary.) without a previous request to depart. But if the person enter quietly, a request to depart is necessary, before turning him out.

This was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue; and a special plea of molliter manus imposuit.

·Evidence was given of the assault on the part of the plaintiff; and evidence

in support of the special plea was given on the part of the defendant.

PARK, J. Laid it down as clear law, that if a person enters another's house with force and violence, the owner of the house may justify turning him ou., (using no more force than is necessary,) without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out, without a previous request to depart.

Verdict for the defendant.

Vaughan, Serjt., and Andrews, for the plaintiff. Pell, Serjt., and C. Phillips, for the defendant.

[Attornies—Warmer and W. Jones.]

If a defendant had turned out a man who had entered his house with violence, without first requesting him to depart, he could not justify under the plea of molliter manus; as the request to depart is a material part of that plea. It would be but prident, (if not absolutely necessary.) to plead in addition a special justification, on the circumstances of the case: like that in the case of Weaver v Bush. 8 Ter. Rep. 78, and in such a case a plea of son assault demessae, might be as well added, because, in making a violent entry into a man's house, it is by no means unlikely that an assault might be committed.

*IVES v. LUCAS and THOMPSON, Esqrs.

As long as a judgment exists, it protects those who seize property, under an execution founded on it; and if the judgment and execution are set aside, no action lies against the sheriff for any thing he did under it, while it remained in existence.

This was an action of trover against the Sheriff of Middlesex, for wrong-

fully detaining the plaintiff's horse. Plea—General issue.

It appeared that a sheriff's officer, named Weldon, had taken the horse early

in the month of September, 1822.

A witness proved this taking, and that the officer sold the horse to him for

51. about the 15th of September.

To connect the Officer with the Sheriff, a writ of fi. fa. against the plaintiff, directed to the Sheriff of Middlesex, was put in; and a receipt signed by Weldon for the warrant granted by the Sheriff, in pursuance of the writ. After this proof, the declarations of the officer were given in evidence, but they carried the case no further than the witnesses had done.

*An order of Mr. Justice BAYLEY, dated Nov. 17th, was put in; it ordered the judgment on which the execution had issued to be set aside

for irregularity.

PARK, J. Ruled that the plaintiff must be nonsuited; because, as long as the judgment existed, it protected the sheriff; and no evidence was given that the sheriff had the horse in his possession later than the 15th of September, and the judgment was not set aside till the 17th of November.

Vaughan, Serjt. Does not your lordship think that the setting aside the

judgment, makes the sheriff's acts tortious by relation.

PARK, J. Certainly not.

Plaintiff nonsuited.

Vaughan, Serjt., and Knowles, for the plaintiff. Pell, Serjt., for the defendant.

† It has long been settled, that the sheriff is answerable for the taking of goods by a bailiff, acting under color of a warrant from the sheriff; but you must connect the bailiff with the sheriff.

This is best done by proof of the warrant; but as the bailiff in some cases returns it to the sheriff's office, and in others keeps it, it is proper to give both sheriff and bailiff notice

to produce it, to entitle yourself to give parol evidence of it.

And the case of Drake v. Sykes, 7 Ter. Rep. 113, decides, that proof that the person who took goods was a general officer of the sheriff, and had given him a bond of indem-

nity, is not sufficient.

But when you have proved the person to have been the sheriff's bailiff, on the occasion

in question, you are then entitled to give his admissions in evidence.

However, in North v. Miles, 1 Camp. 389, which was an action for a false return, it was sought to give in evidence, a statement made by the bailiff to the plaintiff's attorney, in answer to a question by him, why the writ had not been executed? It was objected to, but Lord Ellenborough held it admissible, and added, "that though the bailiff's general conversation with an indifferent person is not evidence against the sheriff, yet what he bere said, touching the execution of the writ, when remonstrated with by the plaintiff's attorney, is that which the defendant is responsible for.

WILSON v. BOWIE.

If a written agreement is not signed by the defendant, the plaintiff need not give it in evidence, though he himself has signed it, and it regards the matter in issue.

If the plaintiff's counsel calls on the other side to produce a paper and reads it; he is bound to give it in evidence, if it is material to the issue; but if it is not material, the plaintiff's counsel need not give it in evidence, though required by the other side to

This was an action for goods sold and delivered, in which the general issue was pleaded.

The action was brought to recover the value of certain fixtures in a house, No. 420, Oxford Street, now occupied by the defendant, but which had been

previously occupied by the plaintiff.

*Mr. Smallbone was proceeding to prove the value of the fixtures, when, in answer to a question by Mr. Serjt. Vaughan, he stated that there was a written agreement respecting the valuation, but that it was not signed by the defendant.

Vaughan, Serit., for the defendant, contended, that this agreement must be

produced.

As it is not signed by the defendant, I think it need not.

The plaintiff's counsel then called for it, under the usual notice to produce papers, and it was produced by the defendant's counsel.

Bosanquet, Serjt., for the plaintiff, having read it, said, it was not an agree-

ment, not being signed by the defendant.

* Vaughan, Serjt. contended, that as the plaintiff's counsel had called T*10 for it, they were bound to read it in evidence, and to prove it by the

subscribing witness.

PARK, J. Having looked at it, said that it need not be read, as it was only the plaintiff's receipt for 10l., and that it was not material to the case at all; and observed, that if the plaintiff's counsel call for a paper, and look at it, they must read it in evidence, if it is at all material to the case; but if it does not bear on the case, he need not read it. This paper is of the latter kind, and the plaintiff's counsel may go on without reading the paper, or calling the subscribing witness.‡

Mr. Smallbone's examination was then resumed, and the case terminated in

a reference to Mr. Storks.

Bosanquel, Serit. and Archbold, for the plaintiff. Vaughan, Pell, and Taildy, Serjts., for the defendant.

[Attornies —— and Harnet.]

† The following is a copy of the paper in question :-

"Memorandum of an acknowledgment of receiving the sum of 101., by way of deposit of taking such fixtures on the premises. at No. 420 Oxford Street, and being such fixtures as Archibald Wilson has a right to sell in and upon the said premises, and to be taken by two appraisers, or their umpire; possession to be given on the 29th of September, 1823, 101. to be deducted out of the whole amount, and rent and taxes to be allowed for up to the day of taking respectively. the day of taking possession."
"Witness this 27th day of September, 1823.
[Signed] Archibald Wilson. "James Hill, No. 23 Gt. Titchfield Street, Mary-le-bone."

[A subscribing witness.]

The case of Brewer v. Palmer, i Esp. Rep. 213, decides that if there appears to be a written agreement, the plaintiff is bound to give it in evidence; and if it cannot be given in evidence, as being unstamped, the plaintiff must be nonsuited: but that case does not affect the present, as there the agreement covered the whole of the subject matter in discusses. dispute.

The case of Whavem v. Routledge, 5 Esp. 235, in which it was decided, that a party calling for papers, and (on the other side producing them) inspecting them, makes such papers evidence for the other side, though he does not use them as evidence, does not at

all decide that the party so inspecting them is bound to prove them by a subscribing witness, or make them a part of his case.

Probably, the reason why the defendant's counsel was so solicitous to have the agreehad no stamp, the Judge would, if he thought it the foundation of the action, nonsuit.

And, besides, it is probable, that the defendant was aware that the subscribing witness knew some facts in his favor, which he wished to have proved, and yet did not like to risk him in the box as his own witness.

*11] *SITTINGS AFTER MICHAELMAS TERM, LONDON.

BEFORE MR. JUSTICE BURROUGH.

RAWLINGS v. HALL.

In an action on a bill of exchange, a stock-broker may refuse to give evidence that the consideration of it was stock jobbing differences; but whether he is bound to produce his book, kept under the stat. 7 Geo. 2, c. 8, s. 9.—Quare.

This was an action of assumpsit on a bill of exchange, dated May 22d, 1823, drawn by one Little, payable to his own order, on the defendant, who accepted it, and endorsed by Little to the plaintiff.

The usual proofs of acceptance and endorsement having been given on the

part of the plaintiff-

Vaughan, Serjt. We have given the plaintiff notice to prove the consideration of the bill.

BURROUGH, J. That sort of notice does you no good; they are not bound to

Vaughan, Serit., stated in his address to the jury, that the bill had been given to Little for a stock-jobbing difference on time bargains for stock, between him and the defendant; the time bargains took place in the month of April and May last; and that all securities given for money gained on such bargains were made void by an act of Queen Anne, and an act of George the Second.

To prove this, a witness named Alison was called: he was clerk to Little, who is a stock-broker. He proved the account to be of his own hand-writing, but knew nothing of it, except that he copied it from Little's pocket ledger.

Little being called, stated that he was a stock-broker; and on being asked to produce his pocket ledger, *admitted, he had received a subpæna duces tecum, calling on him to produce it, but declined doing so, saying, he feared it might criminate him.

Vaughan, Serjt., contended, that he was bound to produce it.

BURROUGH, J. According to your opening, this witness has been making what are called time bargains; for this he would be liable to a penalty; and you want him to produce this book, to show that he has been doing so: he certainly need not produce it.

Currenood, on the same side, contended, that as the witness's own clerk had referred to it, they had a right to have it for him to refresh his memory from.

BURROUGH, J. You cannot make a man produce his private books, merely because by possibility it may suit your case. - I think you are not entitled to its production.

Curwood then asked the witness if he had ever bought stock for the defendant.

The witness declined answering this.

BURROUGH, J. He is not bound to answer; for, as you open your case, it was a time bargain; and if he answered in your favor, he would be liable to a penalty.

Vaughan, Serit. The penalty must be sued for within six months, which

have now elapsed.

BURROUGH, J. If the party would be open to a prosecution of any kind, he is not bound to answer, and he might be prosecuted at common law.

Curwood then put the bill into the witness's hand, and asked him what had

been the consideration for it.

*This he declined answering; and his lordship held he might do so for the reasons before stated.†

Verdict for the plaintiff.

Taddy, Serjt., and Wylde, for the plaintiff. Vaughan, Serjt., and Curwood, for the defendant.

[Attornies,-Birket and Eike.]

† It may make this case more intelligible, to state, that a time bargain at the stock exchange, is simply this:—Neither buyer nor seller have any stock, but the buyer agrees (nominally) to buy of the seller stock, e. g. 1000L, on a certain day. When that day arrives, if the stock is at a lower price than when the bargain was made, the buyer pays the seller as much per cent. on the 1000L as the stock has fallen: but if the stock has risen, the seller pays the buyer in a similar way.

The sums so paid are called differences. In fact, a time bargain is a mere wager; the seller betting that the stock will fall, the

buyer that it will rise.

But by the statute 7 Geo. 2, c. 8, \$ 8, made perpetual by 10 Geo. 2, c. 8, all contracts made for the transfer of stock, whereof the person in whose behalf the contract is made, shall not, at the time of such contract, be possessed are declared null and void; and the party on whose behalf this is done, is, if he is privy to the transaction, to forfeit 5001., and the broker 1001., half to the king, and half to him who will sue.

By the statute 9 Anne, c. 14, all securities for money won at gaming are declared void. The privilege of the witness (Little) does not seem to be affected by the statute of 46 Geo. 3. c. 37, which only compels witnesses to answer, though they might thereby establish a debt against themselves, or subject themselves to an action: but where the answer would subject the witness to penalty, or forfeiture, the law remains untouched by this act.

would subject the witness to penalty, or forfeiture, the law remains untouched by this act.

The six month's limitation of actions is confined to actions to recover back money paid for differences, and does not extend to actions on the 8th sect. of the act, for the recovery of the penalty of 500l. The only limitation in that case being the same as is applicable to all qui tam actions under the stat. of 31 Elis. c. 5, \$ 5, which enacts, that all actions, suits, bills, indictments, or informations, which shall be had, brought, sued, or exhibited, for any forfeiture, on any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs, or successors only, shall be had, brought, sued or exhibited, within two years next after the offence committed, and not after; and all actions, suits, &c., which shall be had, brought, sued, or commenced, for any forfeiture, on any penal statute, made or to be made, (except the statute of tillage) the benefit and suit whereof shall be limited to the Queen, her heirs, or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued, or commenced by any person that may lawfully pursue for the same as aforesaid, within one year next after the Queen, her heirs, and successors, at any time within two years after that year ended.

Any action after that time to be null and void and of no effect.

But by \$6, it is provided that if any act limits a shorter time for suing in such case, this act is to give no extension.

BEFORE GIFFORD, C. J., PARK AND BURROUGH, J.

In Bank.

RAWLINGS v. HALL.

Vaughan, Serjt., now moved for a new trial, and contended, that the witness, Little, ought to have been compelled to produce his book, however it might criminate him; because by the statute, 7 Geo. 2, c. 8, §. 9, it was enacted under a penalty, that every broker should keep a book, and enter therein all purchases and sales that he made. Now that clause would be nugatory, if such book "could be kept out of sight, merely because it would criminate the broker.

BURROUGH, J., observed, that, at the trial, his attention had not been called to the clause of the statute that made it compulsory on the Broker to keep a book.

The Court then granted a rule to show cause.

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*MILNER et. al. v. TUCKER,

If goods are supplied not conformably to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them.

This was an action of assumpsit for a chandelier sold by the plaintiffs, glass manufacturers in London, to the defendant, who is proprietor of the assembly rooms at Cromer, in the county of Norfolk. It appeared in proof that the plaintiffs were to supply a complete chandelier, sufficient to light the room in question properly. One of the plaintiffs, it was proved, had seen and measured the bail room; and it was also proved that the chandelier was incomplete, and was by no means adequate to the room. After the lapse of nearly six months the defendant returned it.

Burrough, J.—When the defendant received the chandelier, and found it incomplete and inadequate to the room, he should have given the plaintiff potice immediately; and have returned it as soon as he could: but if a man take an article, and keep it, and use it as his own, though it was not according to contract, he is bound to keep it, and pay for it.

Verdict for the plaintiffs.

Vaughan, Serjt.. and Hutchinson, for the plaintiffs. Cooper for the defendant.

[Attornes - and Withers.]

*ADJOURNED SITTINGS AFTER MICH. TERM, AT WESTM.

before Mr. Justice Park.

LEGGAT v. REED.

In actions for work and labor, if it appears that the plaintiff has once given credit to A., he cannot afterwards shift his claim, and charge B.

This was an action for work and labor, in putting up a door at a house in Beaumont Street. Plea—General issue.

Evidence was given to show that the defendant gave the order for the work, but the door was put up in the house of a Captain *Earl*, at whose house a bill had been left by the plaintiff, headed Captain *Earl*.

The defence was, that the defendant was an upholsteser, and had nothing to do with the business, except giving the order on behalf of Captain Earl, to

whom it was contended that the credit was given.

PARK, J. Laid down, that if the plaintiff had once given credit to Earl, he could never shift his claim to charge the defendant or any other person. His Lordship then left it to the Jury, to say to whom the credit was given, whether to Earl or to the defendant.

Verdict for the defendant.

Pell, Serjt., and Stork, for the plaintiff. Vaughan, Serjt., for the defendant.

A still stronger case, on the question, "To whom credit was given," was tried before Mr. Baron Garrow, at the Gloucester assizes. It was the case of Taylor v. Brittan. It appeared that the plaintiff, a jeweller, had supplied the wife of the defendant, who was a merchant's clerk, with jewelry to a large amount. It appeared that the bill delivered was headed "Mrs. Brittan." and that at the time of the purchase of the articles, Mrs. Brittan stated that she bought the articles for a friend in the West Indies, who would send the money for them as soon as received; to which the defendant said—"That will do very well."

GARROW. B. Ruled that though Mrs. Brittan was a feme covert, yet if the jeweller gave credit to her and the remittances she was to obtain from the West Indies, and not to her

husband, the present action against him could not be maintained.

The jury found for the defendant.

And in the case of Bently v. Griffin, 5 Taunt, 356, it was left as a fact to the jury, whether credit was given to the husband or the wife, for the wife's dresses, though she and her husband lived together.

*MARTIN v. JACKSON.

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Whether in an action for work and labor, the party who actually did the work is a competent witness to prove that he, and not the plaintiff, is the person to be paid.—Quare.

This was an action for work and labor, in which the general issue was pleaded.

The usual proofs of the work being doing, and reasonableness of the charges being done through—

The defendant's counsel wished to call a witness named *Flashman*, to prove that he had done the work, and therefore he, and not the plaintiff, was entitled to be paid for it.

Taddy, Serjt., objected to this witness, on the ground that he was not competent to prove his own title to the money in question, and relied on the case of Bland v. Ainsly, 2 N. R. 331.†

PARK, J. I shall not stop this case, for I know the case of Bland v. Ainsly has been questioned.

Hushman was then examined, but his evidence not amounting to anything, there was a

Verdict for the plaintiff.

†The case of Bland v. Ainsly, 2 N. R. 331, was an action of tresspass, for taking the plaintift's goods under an execution against a person named Asbray; it was sought to call Asbray, on the part of the defendant, to prove that the goods were his, and not the defendant's. But the court held Asbray incompetent; for that it was his interest to make out the goods to be his own, as then the execution against him was satisfied, and a debt he eved paid.

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*DAVIS v. STREET.

If a contract is broken, an action for money had and received will not be for money paid under it; an action for breach of contract is the proper remedy: but if the contract has been rescinded it is otherwise.

This was an action for money had and received, with the common money counts, (but no special count) to recover back the sum of 471.5s., paid by the plaintiff to the defendant for a horse, which had been returned to the defendant. Plea—General issue.

For the plaintiff it appeared that he (being a surgeon, and the defendant a horse dealer,) had bought a horse, warranted sound and quiet, of the defendant; which horse being decidedly vicious he returned. The defendant at first refused to take the horse back, but it was at length agreed that he should do so, and the plaintiff receive from him another horse, paying 10l. more; another horse was accordingly sent to the plaintiff, who never paid the additional 10l. This second horse being worse than the first, was afterwards returned, and the defendant received him back.

PARK, J. Early in the cause ruled, that the question of soundness could not be gone into in this form of action, the question here being whether the contracts were rescinded or not.

Vaughan. Serjt., contended that the plaintiff ought to be nonsuited, for here was a contract for a horse, which the plaintiff afterwards dislikes; that contract is agreed to be rescinded on the terms of his taking another horse, and paying 10. As he had never paid the 10., the first contract remained in force.

*Holt, on the same side, contended, that the fulfilling the second contract annulled the first; now the first contract was only to be annulled by the taking another horse, and paying 10l. Those conditions precedent must be fulfilled, before the first contract was at an end; as they had not, the first contract stood.

PARK, J. I think there is no ground for this objection. It appears that the defendant sells the plaintiff a horse that no human being could use; and, on the return of him, it is agreed that he shall have another, and pay 101, and the defendant take the first back. I am clearly of opinion such second contract

completely put an end to the first, and I also think that the defendant receiving back the second horse, as clearly put an end to the second contract.

In his charge to the jury his lordship laid down, that if a contract is broken an action for money had and received cannot be brought by a person who has paid money under such contract, but he must bring an action for the breach of contract; but, in cases where the contract is rescinded, and put an end to, the consideration for the payment of money failing, this species of action is proper.

*Verdict for the plaintiff, damages 31/. 5s.; 16l. having been paid into

court.j

Pell, Serjt., and Storks, for the plaintiff. Vaughan, Serit., and Holt, for the defendant.

[Attornies, Mills and ——.]

†The distinction taken by the learned judge, that a plaintiff cannot recover on the count for money had and received, in cases where the grievance be complains of is a breach of contract, appears to be fully established by the cases. This count applying not to a breach of contract, but to the defendant having money in his hands belonging to the plaintiff, by reason of the failure of the consideration which induced the plaintiff to pay it to the defendant.

In the case of Power v. Wells, Doug. 24 n., and 2 Cowp. 818, the plaintiff gave his own horse and twenty guineas in exchange for the defendant's horse, receiving a warranty that

the defendant's horse was sound. He was unsound. The plaintiff brought an action for money had and received, for the twenty guineas, and an action of trover for his own horse.

The Court of King's Bench held that the action for money had and received, with me sther count, was an improper action to try the warranty; and held that the action of trover would not lie for the recovery of the plaintiff's horse, as the property in that horse had passed by the exchange.

And in the case of Weston v, Downes. Dougl. 23, the court expressly held, that if a contract is rescinded, an action for money had and received lies for money paid under it: for if the contract is broken, this action does not lie; but an action for the breach of contract

must be brought.

The same principle was fully recognised in the case of Towers v. Barret, 1 T. R. 133. In general, in cases of breach of warranty of horses, the plaintiff declares, that in consideration of so much money paid him, the defendant assumed and promised that the horse was sound; but that it really was unsound. To this are added a count for money had and received, and the common money counts. If on the trial it appears to have been a breach of warranty, the plaintiff recovers on the first count, but if the contract was rescinded, he recovers on the second.

The action for money had and received lies in a variety of other cases: for money paid without consideration, money paid by compulsion or mistake, &c., but it was held in the case of Bilbie v. Lawley, 2 Ea. Rep. 469, that if one nave money with full knowledge, or the means of such knowledge in his hands of all the circumstances, he cannot recover back such money, on account of its having been paid under an ignorance of the law

In this case there was no special count, or the money ought not to have been paid into court on the whole declaration: for if there is a special count, and you pay money into court on the whole declaration, you thereby admit the contract to be as laid, and only go to trial on the quantum of damages incurred by the breach of it. This was clearly laid down in the case of Yate v. Willan, 2 Ea. 128, where the first three counts of the declaration stated a special agreement by the defendant, a common carrier, to carry the plaintiff's trunk from London to Oxford, and that the trunk was lost.
The defendant paid 51. into court on these three counts.

The plaintiff's counsel proved this payment of money into court, and that the value of the trunk was 201., contending that the payment of money into court on those counts admitted the contract.

The defence was the usual 51. notice.

The Court of King's Bench held, that by this payment of money into court on these counts the defendant admitted the contract, and disputed only the quantum of the darrage. The plaintiff therefore only had to prove the amount of damages above the sum paid into

But in Clark v. Gray, 6 Ea. 564, it was held, that the defendant might go into any evidence that went to limit the damages, but not to vary the terms of the contract admitted

by the payment of money into court.

And in Guttridge v. Smith. 2 H. B. 374, it was held that the payment of money into court on account, on a bill of exchange, rendered it unnecessary to prove the drawer's hand-writing.

But as the defendant only admits the contract to be as Isid, he does not thereby pre-clude himself from disputing the legality of it. 1 Ter. Rep. 464. However, in cases where a party wishes to pay money into court, without prejudicing

himself in this way, he should either pay in the money on the general counts only, or

apply to the court for leave to pay it in on particular conditions.

Before leaving this subject, it may be as well to state, that if the plaintiff takes out money paid into court on one count of the declaration, he is not entitled to the costs of the other counts. Skarratt v. Vaughan. 2 Taunt. 266.

The way to prove the payment of money into court, is to produce the rule, or an office copy of it; calling the attorney who took the money out of court, is not sufficient. In Hilary, Term, 1810, the Court of Common Pleas promulgated the following rule of practice, for trials at Nisi Prius, (reported in 2 Taunt 267)—"It having been often a question, whether the defendant producing the rule for payment of money into court, was evidence on his behalf, so as to entitle the plaintiff count as vertice for his whole damand without giving credit el to a reply; if the plaintiff took a verdict for his whole demand, without giving credit sel to a reply; if the plaintin took a vereity for the money paid into court, the court would set aside the verdict, without requiring proof of the rule. Therefore it is not evidence for the defendant so as to entitle the plaintiff's counsel to reply."

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*BEFORE MR. JUSTICE BURROUGH.

ALISON v. FOISTER.

In an action against a defendant for the injury occasioned by careless driving of his servant, the plaintiff may recover for injury done to his wife, as well as himself, without bringing a separate action for each.

This was an action against the defendant, for the injury occasioned by the careless driving of his servant, in driving a post chaise against the plaintiff's chaise cart.

The first count of the declaration alleged those facts, and that the chaise cart was broken to pieces, and the *plaintiff thrown down and injured, and his wife also bruised and injured, whereby he was put to great expense, and lost the society, &c. of his said wife.

The other counts stated separately the injury to himself and his wife, and the breaking the chaise cart. Plea-The general issue.

The evidence went clearly to prove the injury and the negligence.

Vaughan, Serit., contended, that as the wife was no party to the action, the

mjury done to her, could not be reckoned in the damages.

BURROUGH, J. They can be recovered in this action, and if the plaintiff recover here, he can bring no other action for them. And his Lordship distinctly told the jury to find damages for the injury done to the plaintiff and his wife, as well as the breaking of the carriage.

Verdict for the plaintiff, damages 1501.

Pell, Serjt., and Abraham, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—Hubert and Caston.]

TINDAL v. WHITROW.

An admission by a party, that he is in possession of certain premises, is no evidence of his presession on any day antecedent to that on which the admission is made.

This was an action of replevin, and one of the points in issue was, whether the plaintiff was tenant to the defendant's principal, a Mr. Furlar, as whose bailiff the defendant justified.

A witness stated that in the month of October, 1822, the plaintiff told him

he was tenant to Farlar.

BURROUGH, J. Ruled that that was no proof that he was *tenant, ante-

redent to the day on which the admission was made.

But on another witness being called to prove that the plaintiff was in possession of the premises, to which this statement related, at a much earlier period, his Lordship left the whole claim of the earlier rent to the jury, on this evidence of tenancy.

Verdict for the defendant.

STEWARD v. COESVELT.

If a horse is sold with a warranty, any fraud at the time of the sale will avoid the sale, though it is not on any point included in the warranty.

This was an action to recover the price of a horse, sold by the plaintiff to the defendant. Plea-General issue.

For the plaintiff evidence was given of the sale, and that the price was a fair one; and the written warranty being called for by the plaintiff's counsel, was produced by the defendant. It warranted the horse sound and free from vice.

The defence was, that the sale was avoided by fraud, for that the plaintiff at the time of the sale represented that the horse was five years old, and had often been used as a hunter, but it was proved that the horse, though more than four years old, was not five.

Vaughan, Serjt., objected, that as there was a written warranty. in which

nothing was said of age, parol evidence was not admissible on that point.

Burrough, J. Held it admissible as general evidence of fraud, and his Lordship told the jury, that if there was fraudulent representation at the time of the sale, it invalidated the contract, no matter whether it was a breach of the warranty or not; but here there was no pretence for a charge of fraud.

*Verdict for the plaintiff, for 1471., the price of the horse.†

Vaughan, Serjt., and Hutchinson, for the plaintiff.

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Bosanquet, Serjt., and Comyn, for the defendant.

[Attornies—Rigby and Lawford.]

† Fraud avoids a contract, both at law and in equity, but mistake is no answer to it at

law, but only in equity.

The written warranty of a horse does not require an agreement stamp. The one in the principal case was not on any stamp, and was still given in evidence. Horse warranties are generally written at the bottom of the receipt for the purchase money, or in the body of it.

[Special Jury.]

STAFFORD et al. Assignees of William Clark, jun., a Bankrupt, v. WIL-LIAM CLARK, sen.

If a man has goods in his possession, as the servant of his father, for the purpose of carrying on a trade for the father's benefit only, they will not pass to his son's assignees under the statute of 21 Jac. 1. c. 19.

If a broker proves the value of goods, he need not put in a written appraisement on stamp.

If a broker proves the value of goods, he need not put in a written appraisement on stamp. If the trading, &c. of a bankrupt is proved by the proceedings under the commission, the counsel for the opposite party have no right to look at any of the proceedings, but such as have been used for that purpose.

This was an action of trover. The declaration consisted of two counts: the first stated, that William Clark, jun. before he became bankrupt, was lawfully possessed of a variety of articles therein enumerated, and of three bills of exchange therein described, which bills and securities for money were of the value of 2000l.; that the defendant found and converted them before the bankruptcy, and has refused to deliver them to the bankrupt before the bankruptcy, or to the plaintiffs since.

The second count was similar to the first, except that it laid the finding and conversion after the bankruptcy. Plea—General issue.

To support the commission, the proceedings under it were put in, no notice having been given under the statute, *49 Geo. 3, c. 121, s. 10. By the depositions, the trading was clearly shown; and it appeared that the act of bankruptcy was lying in prison, in the King's Bench prison, two months from the 22d day of May, 1822. The deposition of the petitioning creditor stated that debt to be due between the first day of October, 1821, and the eleventh day of May, 1822.

The commission and assignment were put in.

To prove a prior act of bankruptcy, a servant named Sloane was called. He stated that he denied the bankrupt to a creditor, the bankrupt saying he was busy.

It appeared in evidence that the bankrupt had possession of part of the goods up to the time of his failure, but they were the property of the defendant, (his father,) who took them back. These were proved to be of the value of 721.

When the bankrupt failed, (but some time before the commission was taken out.) his father put him to carry on business for him, as his servant, and bought farmiture for the house, where that was carried on: his furniture was to the value of 1501. A broker proved that he valued it. He took an inventory in writing.

Vaughan, Serjt., contended, that this written inventory must be produced. Burrough, J. If he speaks of the value of the goods from recollection, the

inventory need not be produced,†

The bills the defendant had given the bankrupt cash for, previous to the latter act of bankruptcy.

Cross, Serjt., one of the defendant's counsel, wished to look at the depositions under the commission.

Pell, Serit, objected, that the learned Serit, had only a right to look at those depositions which were already in evidence, and not the whole of them.

BURROUGH, J. Those in evidence are all that can be read by the defendant's

[†] Objections of this kind are often taken; because, by the stamp act, 55 Geo. 3. c. 184, all appraisements and valuations of effects, real or personal. (except those made under order of a Court of Admiralty, or for the purposes of the legacy duty.) must be stamped; and in general, when brokers value goods, they make a list in a book without a stamp, and then give in to the employer a gross valuation of the whole in the lump.

counsel. A demand of the goods on the part of the assigness and the defendant's refusal, were proved.

Vaughan, Serjt., for the defendant, contended, that if, on the occasion spoken to by the servant, Sloane, the bankrupt was denied, because he was busy, that would be no act of bankruptcy; and further, that the denial of a trader to a creditor was not an act of bankruptcy, if the trader at that time owed no debt, which could be a petitioning creditor's debt.

For the defendant, the bankrupt himself was called; but his evidence did not vary the case.

Burrough, J., in summing up, said, by a statute of James the First, it it enacted, that if any bankrupt has at the time of his bankruptcy any goods in his order and disposition, of which he is reputed owner, such goods shall pass to his assigness.

*If they thought the goods valued at 721. were in that situation, they *27] would find a verdict for the plaintiff for that sum.

As to the alleged act of bankruptcy spoken to by Sloane, if the bankrupt was busy, and therefore denied himself, it is no act of bankruptcy. The petitioning creditor's debt is alleged to be due between October, 1821, and May, 1822; that, however, proves no more than a debt due in May; and certainly, as the defendant's counsel stated, that put an end to the act of bankruptcy at Christmas, 1821. But when I was a commissioner of bankrupts, we always, under an order of Lord Longhborough, put a schedule to the deposition, to show the exact time when the petitioning creditor's debt accrued: but that has not been done in this case.

As to the goods valued at 150l., the father, after his son's failure, put him into business as his servant, in a house furnished at his expense. If the son

- † The only depositions under the commission which were used in this case, were, to prove the trading, petitioning creditor's debt, and act of bankrupicy, under the 49 Geo. 3, c. 121. And certainly none of the other depositions could be evidence in this case; for if the defendant wanted the evidence of any one examined before the commissioners, he must call him as a witness.
- † This is ensected in the stat. 21 Jac. 1, c. 19, \$. 11, on which section more actions are brought by the assigness of bankrupts than perhaps on any other. It is to the following effect:—"And for that it often falls out, that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own."
- "Then be it enacted, that if at any time hereafter any person or persons shall become bankrupt, and, at suchtime as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chartels, whereof they shall be reputed owners, and take upon them the sale. alleration, or dispositions as owners, that in every such case the said commissioners, or the greater part of them, shall have power to sell and dispose the same, to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt."

The case of Mace v. Cadell, Cowp 232, decides, that to come within this clause, the goods need not have been originally the bankrupt's property, and that it extends to all goods that the owner allows the bankrupt to use as his own.

The right of the assignees attached to all goods in the bankrupt's possession and ordering, at the time of his bankruptcy, unless some circumstance appears to take the particular case out of the reach of the stature:—As that the bankrupt had them as executor or factor, or goods in the temporary custody of the bankrupt, or where property has been delivered to the vendee as amply as the case admitted, or where the bankrupt has the possession of the goods for a special purpose only, or where a bankrupt, living with his wife has possession of the separate property of the wife settled before marriage in trustees for her separate use; and perhaps in some other special cases.

And in Ryal v. Rolle, 1 Wills. 260, it was resolved that choses in action passed to the

assignees, under the statute of James, the same as goods.

It often happens, that when commissioners are at Guildhall, that if the petitioning creditor's debt is for goods sold, the commissioners annex the bill of parcels to the depo-sition, which, of course, shows the date of the debt. But there are many such depositions without it.

was really his servant, those goods cannot be recovered by the assignees. to the bills, I think the case is not made out; but as to the 721., I think it is,

Verdict for the plaintiff, damages 78L

Pell and Lances, Serits., and Comyn, for the plaintiff.

Veughan and Cross, Serjus., and Hutchinson, for the defendant.

[Automies—Searle and Bland.]

SELLS v. HOARE, GOODWYN, et. al.

Action on the Statute of Marlbridge for an excessive distress.

This was an action on the case against the defendants for taking an excessive distress.

The first count of the declaration stated that the plaintiff, after the making of a certain act of Parliament, intituled, " an act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time, before, and at the time of committing the grievance *next mentioned, held a certain messuage situate in the parish of St. James, Clerkenwell, in the county, &c., as tenant thereof to the defendants; under, and by virtue of a certain demise, made by the defendants before, &c.—Yet the defendants not regarding the said statute, but contriving, &c., on, &c., wrongfully &c., seized, took, and distrained, &c., divers goods, and injuriously sold and disposed of the same: whereas in truth and fact, at the time of making the said distress, the said rent was not in arrear.

The second count omitted all mention of any statute, stated a tenancy as before, and that defendants maliciously pretending that a large sum, to wit, 951., was due for rent, maliciously seized other goods, a small part only of the said rent, to wit, 11. 3s. being due; which goods the defendants injuriously sold.

The third count was like the second, only it particularly set out the articles seized, and stated that at the time of the distress a small part, to wit, a hundredth part of the goods seized, would have satisfied the rent due.§

*The fourth count was in trover. Plea-Not guilty. *30] In support of this declaration, the plaintiff's counsel put in a notice of distress, dated the 30th of May, 1819; stating the distress to be for 951., rent

It should be observed that to support a count on this clause there must have been a

distress and sale, no rent being due

† This second count for maliciously distraining for more rent than is due, is a count at

The third count, for taking an excessive distress, is founded on the statute of Markings, 52 Hea. 3, c. 4, which enacts that, "distresses shall be reasonable and not too great."

I The count in trover is added in all actions on the case, where there has been either an anlawful taking or detaining of goods.

[†] This count is framed on the statute 2 W. & M. sess 2, c. 5, §. 5, for distraining and selling goods for pretended rent due, when in reality no rent is due. That statute enacts, "That in case any distress and sale shall be made by virtue or color of this act, for rent pretended to be in arrear and due, when in truth no rent is arrear or due to the person or Persons distraining, or to him or them in whose name or names, or right, such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may by action of trespass, or upon the case, to be brought against the person or persons so distraining any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

in arrear, to Messrs. Goodwyn, for the Coach and Horses public house, in St. John Street Road.

A witness named Manning proved that he had called on Mr. Goodwyn, one of the defendants, and stated to him that his people had seized Sells's goods, for 95!., though the rent was only 65!. a-year; and that though Sells had had it three years, he had regularly paid 50!. a-year to Mr. Goodall, the ground landlord, so that on that account there could be but 45!. due, and that, by the direction of Messrs. Goodwyn, Sells had expended 43!. in repairs; so that instead of 95!., the sum distrained for as being due, about 2!. was the whole sum due from Sells to Messrs. Goodwyn. The witness further stated that Mr. Goodwyn admitted the whole of this to be true; but said that they had heard that Sells conducted the house so that the license was in danger, and they were determined to get him out at all ovents.

In his cross examination, by Vaughan, Serjt., he said he had been sworn on the New Testament, and believed it;† he had been educated a Jew, but

had changed his religion, though he still had a seat in the Synagogue.

Vaughan, Serjt., then wished to ask him if the 43l. for repairs had not been demanded in a former action.

Taddy, Serjt., objected, that that could only be shown by the record.

*Vaughan, Serjt., said, he should produce the record in due time.

Виккоиен, J. Held, that as the plaintiff's counsel had gone into evidence of the repairs, the defendant's counsel had a right to ask this, to explain it.

Mr. Goodall, the ground landlord, proved that Sells had paid him the ground

rent, 50%. a-year, regularly, as it became due.

A witness named Mills valued the goods in the house before the seizure; and the inventory given to the plaintiff by the distress-broker being put into his hand, he said that the goods mentioned in that were worth 2001. The witness compared that paper with an inventory book he had made at the time of his valuation.

Pell, Serjt., having looked at the book, contended it ought to be stamped.

BURROUGH, J. Said, that, as a list of goods, it need not, and that the witness put a value on the articles from memory.

A witness proved the distress being taken; and the distress-broker's inven-

tory was now read.

Pell, Serjt., contended, that the first and second counts could not be supported, for they alleged an injurious sale. No such thing having been proved, they must fail; besides it is not shown how the distress was put an end to, and before such an action as this can be brought, the distress must have been completed. If a person takes a distress wrongfully, and does no more, he may be treated as a trespasser, but not sued on the statute of Marlbridge.

BURROUGH, J. I think that statute will not reach any thing but a complete distress; but here is a count in trover, and if the taking was wrongful, the tres-

pass may be waived; and the plaintiff may go on the count in trover.

Taddy, Serjt. The third count is for taking an excessive distress, and it cannot be material, under the statute of Marlbridge, whether the distress was sold, or not, as at the time of the passing that statute no distress could be sold.

Vaughan, Serjt., in addressing the jury for the desendant, stated, that in a former cause the 431. for repairs had been recovered; and that the sums paid

† Questions to a witness with regard to his religious belief, if put with a view to show him incomperent as a witness, must be put before he is aworn in chief; questions like those asked in the principal case only go to his credibility.

4 By the stamp act, 55 Geo. 3, c. 184, there must be a stamp on all appraisements and

A By the stamp act, 55 Ges. 3, c. 184, there must be a stamp on all appraisements and vervations of any estate or effects real or personal, except appraisements and valuations made under an order of the court of admiralty, or for the purpose of the legacy duty. But such a book as the one produced contains no sums or values, but only a list of articles.

to the ground-landlord had been written off the beer account that Sells had with the defendants, at Sells's own desire; he could not be allowed for it twice over, therefore 95!. were due. However, after the distress, the plaintiff agreed with the defendants, and consented to give up the house, on being paid by them for good-will 100%, for his furniture 252%; and his allowing them for rent, and their debt for beer. That was carried into effect by a broker on his part, and one on theirs; the plaintiff then received the balance, a sum of 2091. 18s. for which he gave a receipt, and was quite satisfied. In answer to the count in trover, the learned Serjeant said, he would put in a letter from the plaintiff to the distress-broker, desiring him to keep possession of the goods.

The Nisi Prius record of the former cause, was put in; it was produced by a clerk from the Common Pleas Office; it was between both the same parties, the declaration *contained only the common counts in assumpsit, for goods sold, &c.; and a verdict for the plaintiff was indorsed on it.

The defendant's attorney then proved the plaintiff's attorney's signature to a bill of particulars given in that action: one item of it was, repairs 431.

The letter from the plaintiff to the distress-broker was proved and put in; it was addressed, Mr. James White, and was in the following terms-

"SIR.

"I hereby desire you will keep possession of my goods, chattels, and effects, which you distrained the 30th day of April last for rent due from me to Messrs. Goodwyn and Co., in the place they now are, being on the premises, the Coach and Horses, St. John Street Road, Clerkenwell; and I will pay the man for keeping the said possession. As witness my hand, this 7th day of Rd. Sells." May, 1819.

The broker who acted for the plaintiff, at the settlement of the accounts after the distress, was called; he stated that he valued, and made the account out, as above stated by Mr. Serjeant Vaughan, and he saw the plaintiff receive the balance, 2091. 18s. for which he gave a receipt. He appeared quite satisfied.

BURROUGH, J. Put it to Taddy, Serjt., whether he could sustain the plaintiff's case.

Taddy, Serjt. The letter is only the usual notice given, to prevent a distress from being sold; and the ground rent could only be set off against the other

A clerk of the defendant proved, that the sums paid as ground rent were given credit for in the beer account, at the plaintiff's express request.

* Vaughan, Serjt., then offered evidence of the bad manner in which the public house was conducted; but-

Burrough, J. Held it clearly inadmissible.

Three witnesses stated, that they would not believe the witness Manning on his oath.

Taddy, Serjt., replied.

BURROUBH, J. Told the jury that the accounts having been settled after the distress, any right of action the plaintiff had previously for any thing about the distress, must be considered as waived or settled for in that compromise, and if they thought the ground rent had been applied to the beer account at the plain-

† This evidence certainly could have nothing to do with the legality or illegality of the distress, the only question to be tried in this action.

I It very often happens, that witnesses are called to swear that they would not believe a person called by the opposite party, on his oath; they are asked how long they have known him, and whether they would believe him on his oath; if they say they would not believe him, the other party are at liberty to ask what are the grounds of such opinion. But it is very imprudent to ask this, unless you are certain that they know little that is prejudicial to him, or else you will not only have it proved that they would not believe him, but that he has been guilty of crimes and misconduct which will not raise his credit with the jury.

[*35

tiff's own request, he had had the benefit of it in the manner he wished, and the repairs had been given by the former verdict. On these grounds the defendants were, he considered, entitled to a verdict.

Verdict for the plaintiff, damages 1s.

The Judge certified under the statute of Queen Elizabeth.† *Taddy, Serjt., and Storks, for the plaintiff.

Vaughan and Pell, Serjis., F. Pollock, and Andrews, for the defendants.

[Attornies, Goddard and Hutchinson.]

† By the statute 43 Eliz. cap. 6, \$. 2, it is enacted, "If upon any action personal to be brought in any of her Majesty's courts at Westminster, not being for any title or interest of land, nor concerning the freshold or inheritance of any lands, nor for any battery, it shall appear to the Judges for the same court, and so signified or set down by the Justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of forty shillings or above: that in every such case the Judges and Justices before whom any such action shall be pursued, shall not

award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

The certificate under this act goes to deprive the plaintiff of costs, whereas all certificate under other acts give costs to the plaintiff; and a certificate under this act takes away costs in all cases (but those above excepted,) where the damages are under forty shillings; though under other acts the plaintiff would be entitled to full costs. The case of Walker v. Robinson, 1 Wilson 94, was an action of trespass for stopping the plaintiff's wagon and taking away a cart rope; this the defendant justified as a distress for toll, due to the corporation of Doncaster. The jury found for the plaintiff damages eighteen-pence. BURNET, J., who tried the cause, certified under this statute to deprive the plaintiff of his

coats, his certificate written on the postea was in these terms-

"I do hereby certify that the damages to be recovered in this action do not amount to forty shillings, but to one shilling and sixpence, and no more."

It was contended that as there was an asportation, the plaintiff was entitled to full costs; and also, as the trespass was justified, it was admitted to be wilful, and on that ground he was entitled to full costs. Lee, C. J., and the rest of the court of King's Bench, held that as this case did not come within the exceptions of this statute, the certificate deprived the plaintiff of full costs. But either the asportation or the justifying the trespass would have entitled the plaintiff to full costs, if there had been no certificate under this statute.

It is rather singular that, though this statute was made in Queen Elizabeth's reign, it was never acted on till the year 1744; when, in the case of White v. Smith, mentioned in 2 Str. 1232, Willes, C. J., granted such a certificate in an action for taking sand on

Hounslow Heath. At the present day, however, it is granted very frequently,

*SCHOLEY v. GOODMAN.

Agreements by husband and wife to live separate are legal. If you intend to set up adultery to avoid such agreement you ought to plead it. If the parties live together after the agreement, that will put an end to it. The wife's conduct towards her husband on coming back, is evidence on action by her trustee for the separate maintenance.

This was an action of assumpsit. The first count of the declaration stated, that there had been differences between the defendant and his wife, which still continued to exist, and that on, &c., at, &c., a certain agreement was entered into between the defendant, of the first part; his wife, of the second part; and the plaintiff, of the third part. The declaration went on to state the substance of that agreement; which was, that the defendant and his wife should live separate, and the defendant be indemnified by the plaintiff, for all charges he might incur on his wife's account, and the defendant agreed to pay the plaintiff 12s. weekly, for the support of the wife. The declaration also stated the other clauses of the agreement; and that, in consideration the plaintiff would fulfil the said agreement on his part, the defendant undertook, &c. to perform the

said agreement on his part. And although the defendant and his wife have lived separate, and the plaintiff and she have performed their parts of the said agreement, the plaintiff saith that divers large sums, &c. are in arrear, according to the said agreement, yet the defendant not regarding, &c. but contriving, &c. did not pay, &c. but hath wholly refused, &c. Other counts were, indebitatus assumpsit for board and lodging, &c. supplied to the wife at his special instance and request; a quantum meruit for the board and lodging; and the common money counts, omitting all mention of the wife. Plea-General issue.

This case had been originally tried at the sittings after Michaelmas term, 1822, before Dallas, C. J., when a verdict was given for the defendant, on the

ground of the adultery of Mrs. Goodman.

*A new trial was subsequently ordered, on the ground that the Lord Chief Justice had admitted the declarations of the wife, Mrs. Goodman, 25 evidence of the adultery. This species of evidence the court were of opinion The cause, therefore, came now to be tried a second time. was inadmissible.

On the part of the plaintiff the agreement was put in, (it was not under seal,

and therefore was a mere agreement in writing.) The execution was admitted. It was between the defendant, of the first part; Jane Goodman, his wife, of the second; and the plaintiff, of the third part. It recited that differences had taken place between the defendant and his wife, which were likely to continue, and that the defendant had agreed to allow his wife 12s. a-week, and the plaintiff was to keep him indemnified from all charges on her account, so long as the 12s. a-week were paid. The parties then agreed that the said Jane Goodman and her husband should live separate, and that she should be and reside with, such persons, and at such places, as she should think fit, wholly freed from the authority of her husband, in all respects, as if she were sole and unmarried; the defendant then agreed to pay the plaintiff 12s. weekly, for the use of his wife: and the plaintiff agreed to save him harmless as to her; and that the husband and wife should not molest each other in any way, or bring any suit in the Ecclesiastical Courts. And for the performance of these conditions, each party bound himself to the other in the penal sum of 500%. This agreement was dated on the 12th of October, 1821.

A witness proved that the defendant told him, he had paid 121. under the

agreement, but would pay no more.

Another witness named Stringfield proved, that in the month of June, 1822, the defendant came to ask his advice, as to whether he had better continue the payment under the agreement; the witness stated that he advised him to do so and that the defendant said he would send the money.

*Vaughan, Serjt., now contended that the plaintiff should be non-

suited, because agreements like this were void in law.

BURROUGH, J. I am clearly of opinion, that this agreement is perfectly legal

and good.

Vaughan, Serjt., then addressed the jury, and contended that he was entitled to a verdict, on the ground of the adultery of Mrs. Goodman: and also, that after the agreement, the defendant and his wife had slept together, which put an end to agreements like this, and was known in civil law under the name of Condonation.

On the defendant's counsel calling a witness to prove the adultery-

BURROUGH, J. Said, I think adultery cannot be given in evidence in this case. The agreement is, that the plaintiff shall indemnify the husband against all demands on account of the wife. If adultery is to be set up, you must prove notice of it, and it should have been pleaded specially.

Comyn, submitted that it need not; for that, where, in actions for goods sold to the defendant's wife, her elopement is set up as a defence, it is con-

standy given in evidence under the general issue.

BURROVEH, J. There, there is no contract; but here, there is a good contract, which is to be avoided: it must be pleaded specially.

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The defendant's counsel then offered to prove adultery, and notice of it, to

the plaintiff.

Burrower, J. Adultery ought to be pleaded: from the conferences I have had with my Lord Chief Justice and my brothers, on former occasions, I am clearly of that opinion.

Vaughan, Serjt., then contended, that the condonation, by taking the wife

back after the agreement, put an end to it.

BURROUGH, J. You may go into that.

The defendant's counsel then called his daughter, who proved, that in the month of *January*, 1822, the wife came to the defendant's house; and, there being a card party, she acted as mistress of the house.

Vaughan, Serjt., objected to what the wife said on this occasion being

received in evidence.

Burrough, J. Her conduct on her return is clearly evidence.

The witness then stated that the defendant and his wife slept together that night, but the wife went away in the morning: she came for the night, and went away in the morning, on two or three other times afterwards.

Two other witnesses confirmed this evidence, but carried the case no

further.

Pell, Serjt., replied.

BURROUGH, J. In summing up, observed, that if the case stood on the agreement alone, that would be put an end to by the defendant subsequently receiving back his wife, and sleeping with her, by the condonation as it is termed; but, according to the evidence of Stringfield, the defendant considered himself bound by the *agreement, and recognised it so late as June, 1822: and that was long subsequent to the supposed condonation, which was in January, 1822. His lordship therefore thought the plaintiff entitled to a verdict.

Verdict for the plaintiff, damages 10%.

Pell, Serjt., and Curvoood, for the plaintiff.

Vaughan, Serjt., and Comyn, for the defendant.

[Attornies—Besant and Drew.]

LEVY v. EDWARDS.

If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow.

This was an action against the defendant for assaulting, beating, and imprisoning the plaintiff. The second count was for a common assault. Plea—Not Guilty.

It was proved on the part of the plaintiff, that on Sunday, the 25th of August, 1822, he was walking through Stepney fields, where there had been a fight between two boys, which the defendant, and two others who acted as constables, had just put a stop to; and the defendant was handcuffing one of the boys, when the plaintiff civilly said to him, "you have no right to handcuff the boy;" when the defendant gave the plaintiff a blow with his stick, and took him to the Whitechapel watch-house, where he detained him an hour, till he was bailed by his friends; and that Sir Daniel Williams, on the parties

going before him the next morning, dismissed the case. It appeared that before him nothing was taken down in writing.

The charge-book from the watch-house was produced by the defendant's attorney, pursuant to notice: it contained a charge against the plaintiff of insulting the defendant in the execution of his office.

A notice to the defendant, signed by the plaintiff's attorney, demanding perssal and copy of any warrant under which he acted was proved.

And the writ sued out in this case was also put in to show at what time the action was commenced.

Pell, Scrit., contended, that the plaintiff must be nonsuited, because the writ was served on the 27th of November, 1822, and the affair happened on the 25th of August; and he contended, that persons assisting at a fight were idle and disorderly persons, within the vagrant act, 3 Geo. 4. c. 40.

*Burrough, J. Was clearly of a contrary opinion, but thought that as to handcuffing the boy who had fought, and taking him to the watchbouse, the constable was justified.

† By the statute 24 Geo. 2, c. 44, no action shall be brought against any constable, headborough, or other officer, or any acting by his order, or in his sid, for any thing done under a justice's warrant, unless a demand of the perusal and copy of such warrant has been made or left at the usual place of his abode, by the party, or his attorney or agent, in writing, signed by the party demanding the same: and the same refused or neglected for six days after demand. And in case of compliance, by showing it, and permitting a copy to be taken by the party demanding, on action brought, without joining the justice, the warrant shall justify the officer, &c., notwithstanding want of jurisdiction in the justice; and if the justice is joined, a verdict shall be given for the constable; and if the verdict is against the justice, he shall pay the plaintiff the amount of the constable's costs. It has been decided, that if the demand of perusal and copy has not been complied with within the six days, if it is complied with before the action is brought, it is sufficient. The statute only extends to actions of tert.

This demand is not necessary where the officer has no warrant, or for so much as he has exceeded his warrant: but it is prudent always to make such demand, which is good, if signed by the plaintiff's attorney instead of the plaintiff. This demand is best proved by proof of a duplicate original, or it may be proved by a copy or other secondary evidence, if notice has been given to the defendant to produce the original.

By the same act, all actions against constables must be commenced within six calendar months after the act done; and this is so, whether the constable has exceeded his authority or not, and applies to all cases where he acts as constable. However, I should observe, that by several acts of Parliament, constables acting in pursuance of those acts must be said within three calendar months. This makes it necessary for the plaintiff to prove that the action was commenced within time: this may appear on the face of the record, if not, other proof must be given of the latitat bill of Middlesex, or capias, and of the time of suing it out, the tests not being sufficient proof of the time when it was sued out: because the tests of latitats sued out in term is the first day of the term; of those in vacation, the last day of the preceding term. I think it is also necessary to prove, that the fact complained of took place in the county where the sense is laid; for, by the statute 21 Jac. 1, c. 12, \$5, it is enacted, "That if any action, bill, plaint, or suit upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor, or balliff of city, or town corporate, headborough, portreve, constable, tithingman, collector of subsidy or fifteenths, churchwardene, or persons called sworn-men, executing the office of churchwarden or overseer of the poor; and their deputies, or any of them, or any other which in their aid or assistance, or by their commandment, shall do any thing touching or concerning his or their effice or offices, for or concerning any matter, cause, or thing hy them or any of them done by virtue or reason of their or any of their office or offices, that the said action, bill, plaint, or suit, shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere: and that if upon the trial of any such action, bill, plaint, or suit, the plaintiff or plaintiffs therein shall not prove to the jury which try the same, that the respass, ba

I thought it right to state this clause at large, as no mention is made of these provisions, or of this proof being necessary in several of the best books on this subject. The same section allows these officers to give special matter in evidence, under the general issue, and gives them double costs if successful. Constables are not entitled to notice of action as justices and revenue officers are, but only to the demand before mentioned.

7

For the defence, it was proved by the two other constables, that when the defendant was taking the boy to the watch-house, the plaintiff placed himself

before him to prevent his doing so.

BURROUGH, J. There can be no doubt that the constables were right in stopping the fight, and would be justified in apprehending any one who aided or abetted those who fought; but it did not appear that the plaintiff did either. If they thought that as the defendant was apprehending the boy, the plaintiff placed himself before the defendant to hinder him from doing so, that would justify the defendant in detaining the plaintiff at the watch-house, but not in beating him; but if the plaintiff only said "you have no right to handcuff the boy," the defendant was clearly a wrong doer as to the whole.

Verdict for the plaintiff on the whole declaration-

Damages, 40s.

Vaughan, Serjt., and Curwood, for the plaintiff. Pell, Serjt., and Comyn, for the defendant.

[Attornies-Jones and Smith.]

•ADJOURNED SITTINGS AFTER MICH. TERM, IN LONDON. [*44

BEFORE MR. JUSTICE BURROUGH.

MAY et al., v. MAY et al.

If money is paid by two persons for the benefit of a third, where they ought to bring a joint action for the whole sum, and where each a separate action for the sum he has advanced. — Quære.

This action was brought by the plaintiffs to recover the sum of 446/., paid by the plaintiffs as bail in error for the defendants. To make up this sum of money, each of the plaintiffs advanced his share.

Vaughan, Serjt., contended, that separate actions ought to have been brought by each of the plaintiffs, because the money paid was the money of each, and

there could not be a joint action unless it were paid from a joint fund.

Burrouch, J. Overruled the objection, and was of opinion, that as the plaintiffs made the payment to the defendants in error, in one sum, and as a joint payment, this action could be maintained in its present form.

Verdict for the plaintiffs for 4461.

BEFORE GIFFORD, C. J., PARK, AND BURROUGH, JS.

In Bank.

Vaughan, Serjt., now moved for a rule to show cause why a new trial should not be had, on grounds similar to *those of his objection at the trial, and cited Osborne v. Harper, 5 East, 225; and Brand v. Boulcot, \$Bos. & Pul. 235.

GIFFORD, C. J. Observed, that it was a nice point.

The court granted a rule to show cause.

Pell, Serjt., and Holt, for the plaintiffs.

Vaughan, Serjt., and Hutchinson, for the defendants.

[Attornies—Boxer and May.]

In Osberne and another v. Harper, 5 Ea. 225: the plaintiffs and the defendant had been partners; and after the dissolution of their partnership, the defendant drew a bill in their joint names. The other parties to the bill were ignorant of the dissolution of the partnership: and the holder brought an action against all three. Harper pleaded his bankruptcy, and a melle presequi was entered as to him but against the two plaintiffs; a verdict passed for 11561. The two plaintiffs were never partners after the dissolution before mentioned; but their attorney proved that he had discharged the whole demand 11561., at the request of both the plaintiffs. The case was much discussed as to whether each plaintiff should not have brought a separate action for his share: but on an affidavit being produced (by direction of the court) that the attorney advanced the money on the joint credit of both the plaintiffs, the court held that it was a joint fund from which the payment was made, and a joint action was therefore maintainable. In Brand and another v. Boulcot. 3 Bos. & Pul. 235. the plaintiffs and defendant had been joint assignees, under the bankruptcy of T. L. The solicitor's bill was 2081.: each of the plaintiffs plaintiff bard him 1041., and brought this joint action against the defendant, the other assignees, for his share. Lord Alvandey at the trial nonsuited the plaintiffs, on the ground that each should have brought a separate action; and on motion for a new trial, the Court of Common Pleas were of the same opinion.

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*LEE v. JOSEPH.

Practice.

THIS case was taken as an undefended cause, and a verdict was taken for the plaintiff.

Vaughan, Serjt., now moved for a new trial on the affidavit of the defendant's attorney, who stated that he had not delivered his briefs, conceiving the cause to stand thirty-five off; but twenty-nine of those before it were special jury causes, and so were passed over. The learned Sergeant moved it on payment of costs and giving judgment of the term.

The court granted a rule to show cause.

In the cause list of these sittings the first twenty-four cases were special jury causes.—

Research.)

D

SANDERSON et. al. Assignees of Barge, a Bankrupt, v. LAFEREST et al.

Denial to a collector of king's taxes is as much an act of bankruptcy as denial to any other creditor. A bankrupt can never be a witness to prove his own act of bankruptcy. Whether a letter written by him, within a few days after the supposed act of bankruptcy is evidence.— Quare.

TROVER for wines. The first count of the declaration stated the conversion to be before the bankruptcy; and the second count stated it to be afterwards. Plea—Not guilty.

Notice had been given under the statute of disputing the petitioning creditor's

debt, and the act of bankruptcy.

On the part of the plaintiff the commission was put in, dated April 16th,

1823, and the assignment.

A witness proved the bankrupt's hand-writing to an acceptance for 103/., to a bill drawn by the petitioning creditor at six months, dated October 17th, 1822; this witness, in his cross examination, stated that since the date of the bill, the bankrupt had paid the petitioning creditor sums amounting to several hundred pounds, and since that time the petitioning creditor had supplied him with goods to a considerable amount.

The act of bankruptcy was, being denied to a collector of king's taxes, on

the 8th of March, 1823.

The seizure of the wines by the defendants under an execution after the act of bankruptcy, but before the commission, was admitted.

To prove the value of the wines, the bankrupt, who had obtained his certificate and released his assignees, was called; he stated their value to be 1700l.

Pell, Serjt., contended that in case a verdict was given for the assignees, it ought only to be for the sum of 966l., the sum for which the goods sold under

the execution, as appeared by the sheriff's return.

Taddy, Serjt, observed, that on the sheriff's return, a large sum was allowed to the landlord for rent, and though a landlord in cases of executions is entitled to receive his rent, he is not entitled in case of a bankruptcy, unless he makes a distress, which was not done here. The common course in bankruptcies, is for the landlord to threaten a distress and get paid.

The plaintiff's counsel then put in a letter from the bankrupt, to the petitioning creditor, dated April 12th, 1823, acknowledging a debt of 47l. 12s., in

addition to the bill before mentioned.

Pell, Serjt., objected that this letter, being written after the act of bankruptcy, could not be evidence to support the commission.

Taddy, Serjt. Declarations by a bankrupt after act of *bankruptcy.

and before commission issued, are often received.

Pell, Serjt. Certainly, on other matters, but not to prove the petitioning

creditor's debt, the trading, or the act of bankruptcy.

Burrough, J. A bankrupt can never be a witness to prove his own trading, or an act of bankruptcy committed by himself, or the petitioning creditor's debt; but I shall admit this letter in evidence, being written before the commission issued though after the act of bankruptcy, as the question of such letters being admissible is now pending in the Court of Exchequer.

Verdict for the plaintiff, with liberty to enter a nonsuit on this point.

Vaughan, and Taddy, Serjts., and F. Pollock, for the plaintiffs

Pell, Serjt., for the defendants.

BEFORE GIFFORD, C. J., PARK AND BURROUGH, JS.

In Bank.

Pell, Serjt., now moved to enter a nonsuit, and contended that this letter, ought not to have been admitted in evidence, and without it there was no proof of any petitioning creditor's debt. The letter was dated before the commission, but there was no proof that it was written before. He cited the case of Robson v. Kemp, 4 Esp. 233, and Brett v. Levitt, 13 East, 213, and mentioned that the point was now under consideration in the Exchence, in a case tried at Salisbury, where Hullock, R., refused to admit the declaration of a bankrupt made before the commission, but after the act of bankruptcy.

The court granted a rule to show cause.

The case of Jefs v. Smith, 2 Taunt. 401, decides, that being denied to a tax collector, is an act of bankruptcy. exactly as denial to any other creditor would be. In the case of Robson v. Kemp, 4 Esp. 233, the act of bankruptcy relied on was the execution of a fraudulent assignment: Lord Ellenborough refused to admit in evidence a declaration of the bankrupt, after the execution of the deed, that it was fraudulent.

bankrupt, after the execution of the deed, that it was fraudulent.

In Brett v. Levitt, 13 East, 213, the petitioning creditor's debt was two bills of exchange, of which the bankrupt was drawer: no notice of dishonor had been given him. but it was proved that after the act of bankruptcy, he said that he knew the bills must come back. Peaks moved for a new trial, on the ground that this declaration was inadmissible, as mado after act of bankruptcy; but the Court of King's Bench decided that it was rightly admitted, and cited the case of Dowton v Cross. 1 Esp. 168, where the acknowledgment of the bankrupt. after act of bankruptcy, was the only evidence of the petitioning creditor's debt; and there Lord Kenyon ruled that the bankrupt's declaration at any time before the suing out of the commission would be sufficient evidence of the petitioning creditor's debt.

EVANS v. YEATHARD.

Semble, that a witness is competent to prove that a debt due jointly to him and the plaintiff is paid.

Assumpsit for the value of ten chaldrons of coals. Plea—General issue.

The delivery of the coals, and the price, were admitted by the defendant's counsel.

Vaughan, Serjt., for the defendant, opened, that the defendant and a Mr. Follet were partners, and that the plaintiff owed them a debt of 88l., for which he had given a bill, and that a day or two before the bill was payable, the plaintiff asked them to take coals for it; and that the coals in question were delivered on that arrangement being come into.

To prove this he called Mr. Follet.

Pell. Serjt.. objected to the competency of Mr. Follet, on the ground of interest, and contended that, coming to prove that the defendant received them on their joint account, by his testimony he is enabled to have a payment made and applied to himself and partner.

Wylde. If by the witness's evidence the defendant obtains a verdict, the defendant must account to Follet for half the amount of the coals, as goods received on the partnership account; but if the defendant loses, Follet would

receive nothing.

Vaughan, Serjt., contra. Mr. Follet comes to prove that a debt due to himself and his partner is paid: so far he comes to prove what is against himself.

Comyn. If the defendant obtains a verdict, it is said that it would give him a claim on his partner; but what he says now, would not be evidence on such a claim, either for him, or against the defendant. No witness ever was rejected because he came to prove that a debt due to himself was paid.

BURROUGH, J. I do not see how the present verdict could be used, either for or against the witness; but if the witness says that the debt due partly to himself is paid, such admission would be indeed evidence against him. I can-

not see why he is not admissible. Mr. Follet was then examined.

Verdict for the defendant.

*Pell, Serjt., and Wylde, for the plaintiff. Vaughan, Serjt., and Comyn, for the defendant.

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[Attornies-Van Sandau and Walker.]

BEFORE GIFFORD, C. J., PARK, AND BURROUGH, JS.

In Bank.

Pell, Serjt., now moved for a new trial, on the ground that Follet's evidence was not admissible.

The court granted a rule to show cause.

[Special Jury.]

COBBOLD v. CASTON.

The plaintiff agreed by parol, that if the defendant would employ his ship to carry corn, he would bring him coals at a stipulated price. This contract is not within the statute of frauds and need not be in writing; nor is part delivery or part payment necessary to make it binding.

This was an action for a breach of contract, brought by the plaintiff, who resided at *Ipswich*, against the defendant, who was owner and master of the brig *Rigby*, for not delivering a quantity of coals which he had contracted to deliver at a certain stipulated price, whereby the plaintiff was obliged to buy other coals at a loss of 15*l.*, in difference of price.

It appeared in evidence, that these parties had made a bargain by parol, to

the following effect—

That in consideration that the plaintiff would employ the defendant's brig, the Rigby, to take corn to Hull, he would bring back the quantity of coals at the stipulated price.

*He was employed to take the corn, but never brought any coals. The

151. loss was also proved.

Pell, Serjt., contended, that this action could not be maintained. This is a contract to deliver coals at a certain price, no written contract being made, and

no part delivery or part payment; therefore it fell within the statute of frauds. That was determined in the case of Garbut v. Watson, 1 Dowling & Ryl

Vaughan, Serjt., contra. This is not a contract for the sale of goods. In all the cases that have been determined to be within the statute, the vendor has had the goods; but this defendant's bargain was to bring the coals from Hull.

BURROUGH, J. I do not think the cited case applies, because, there the property was in the defendant's hands at the time, but here the bargain was respecting goods that the defendant himself had to buy.

Verdict for the plaintiff, damages 15%.

Vaughan and Lawes, Serjts., and Patteson, for the plaintiff.

Pell, Serjt., and G. Marriott, for the defendant.

[Attornies—Montriou and Nelson.]

*AKERMAN v. HUMPHERY. •537

A consignee of goods delivered over to a third person the shipping note of such goods, and a delivery order on the wharfinger, to deliver such goods as soon as they arrive, does not pass the property in them so as to prevent a stoppage in transits by the consignor.

TROVER for hams and butter. Plea-General issue.

In this case a witness proved that a person named Dent, who lived near Richmond, in Yorkshire, was in the habit of consigning hams and butter to a person named Hutchinson, a provision-broker in London. Dent usually sent the goods by land carriage from Richmond to Stockton upon Tees, where they were by his direction shipped by Messrs. Wilkinson of that place, directed to Hutchinson in London. On the occasion in question, Dent sent by post to Hutchinson an invoice of the goods in question, four hogsheads of hams and eight firkins of butter, at the price of 1791. 9s. 10d.

This invoice, dated April 3d, 1823, was read; it was in Dent's hand-wri-

ting, and commenced-

" Mr. Jas. Hutchinson,

" Bought of George Dent."

And was for the goods in question.

In another part of the same letter was an account current, of all the dealings of Dent and Hutchinson, and of the bills given by Hutchinson to Dent; the balance on this account, taking all the bills as money, was 5l. in favor of Dent.

A shipping note sent by Wilkinson & Co. to Hutchinson concerning the

goods in question, was next put in. It was in the following terms-

" Stockton, April 5, 1823

"Mr. James Hutchinson.

"By order of George Dent we ship for you, as below noted, on board the Durham, Rd. Greensides Master, for Hays's Wharf, Southwark,

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London. Any *goods entrusted to our care you may depend on being regularly forwarded.

We are your obedt. servts.



1 & 4, 4 Hhds. Hams.

John Wilkinson, & Co.

Per R. Wilkinson.



8 Firkins.

"P. S. Mr. D. informs us he will have more goods down early on Monday morning, which, if in time for the above vessel, will endeavor to get them on board.

R. W."

This shipping note was received by Hutchinson on the 8th of April.

On the 9th of April, Hutchinson received a loan of 1501. from the plaintiff, on his giving the plaintiff the shipping note and a delivery order, (signed by his clerk by his authority.) on the defendant, in the following terms—

"Proprietors of Hays's Wharf.—Please deliver to Mr. John Akerman, or to his order, the following goods (on arrival) by the Durham, Rd. Greensides, Mr., from Stockton.

For Mr. Jas. Hutchinson.

Jm. Johnson



1 & 4, 4 Hdds. Hams.



8 Firkins of Butter.

" Ratcliff Highway,
" 9th, April, 1823."

*The ship arrived on the 16th of April, with the goods in question on [*35

Another witness proved that, on the 21st of *April*, a person called at *Hays's* wharf, (the defendant's wharf,) and demanded the hams and butter under the shipping note and delivery order. The defendant refused to deliver them, saying, that *Hutchinson* was insolvent.

Three witnesses proved, that in the provision trade, bills of lading were not used, but these shipping notes instead; and the persons in the trade were

accustomed to lend money on those notes and delivery orders.

Vaughan, Serjt., stated the defence to be, that no change of property took place by the delivery of the shipping note, and the order; and that, before the goods arrived at the defendant's wharf, Mr. Dent had ordered them to be stopped in transitu, on account of the insolvency of Hutchinson.

To prove the insolvency of *Hutchinson*, a letter from him to a Mr. Ray, dated April 5th, was put in; in that he confessed himself to be insolvent in

pretty plain terms.

A commission of bankrupt against Hutchinson, dated Nov. 22, 1823, was

put m.

A clerk of Messrs. Fry and Chapman, Hutchinson's bankers, proved that they began to dishoner his bills from the 20th of March, and they dishonored twenty-five of his bills in a few days.

A clerk of the defendant proved Dent's order to detain the goods on the 14th

of April, two days before they arrived.

Mr. Dent having been released by the defendant from an indemnity he had given him, stated, that on the 14th of April, in consequence of two bills that Hutchinson had accepted in his favor being dishonored, and of Hutchinson telling him on that day that he should never pay another bill, he directed the wharfinger, (the defendant,) *not to deliver them to Hutchinson, but to detain them for the witness's benefit. He also stated, that, from a number of bills that Hutchinson had accepted in his (witness's) favor being dishonored, Hutchinson owed him upwards of 500l.

In his cross examination he admitted, that he had not taken up the bills that

Hutchinson had accepted for these very goods stopped in transitu.

A witness proved, that, in the provision trade, there are constantly bills of lading, and that shipping notes are not considered of much accuracy, because, after they are despatched, the sender often finds that he cannot send the goods by the ship-mentioned in the shipping note, and is obliged to send them by

another ship.

Taddy, Serjt., in reply. It is clear in the case of a bill of lading endorsed so a party, that the goods cannot be stopped in transitu, because the right to the property passed by the endorsement of the bill of lading; and the giving the shipping note and delivery order to the plaintiff, passed the property the same as an endorsement on a bill of lading would, because it is proved to be the usage of the trade by three witnesses to have no bills of lading. but these shipping notes instead. And the learned Serjt. contended, that there could in transitu, as the transitus from him was at an end on the goods arriving at Stockton; and that, to support a stopping in transitu, the person so stopping goods must take up the bills the consignee has accepted for those goods, otherwise the consignee does not get the goods, because they are stopped in transitu, and must pay the bills because he has accepted them.

Burrough, J. I do not think that the giving the shipping note and delivery

Burrough, J. I do not think that the giving the shipping note and delivery order to the plaintiff, made a change of the property; and I think the shipping note does not "amount to a bill of lading; a bill of lading is exactly like a bill of exchange, and the property it refers to, passes by endorsement on it, but not by delivery of it without endorsement. I do not think this shipping note, from the nature of it, is endorsible, and here, in point of fact, it is not endorsed; therefore, in my judgment, there was no change of projecty. As to the insolvency of Hutchinson, there could be little doubt of it. I do not think that Dent's not taking up—the bills at all affects the case, because it is in evidence, that the price of these goods was no more than 1791. 9s. 10d., and it appears in evidence that Hutchinson owed Dent 500l. I thin Dent was entitled to stop the goods in transitu on the 14th of April, as he del, and that

therefore the defendant is entitled to a verdict.

Verdict for the defendant, with liberty for the plaintiff's counsel 'n move to enter a verdict for the plaintiff, if the court above should be of opinion, that the property was changed by the delivery to the plaintiff of the shipping wote and delivery order, or that the transitus was at an end on the goods read on Wiltinson, at Stockton.

Taddy. Serjt., and Campbell, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—Hutchinson and Pilcher.]

BEFORE GIFFORD, C. J., PARK AND BURROUGH, JS.

In Banc.

Taddy, Serjt., now moved for a rule to show cause, why there should not be a new trial, when it was discovered *that no notice of the motion had been left at the Judge's chambers.† The learned Serjt., therefore, not being entitled to move it, Burrough, J., said, that it was a point reserved at the trial. He would look at his note, and the learned Serjt. might mention it again.

Taddy, Serjt., now renewed his application, and contended, that as Dent sent the goods by land carriage to Wilkinson, at Stockton upon Tees, the transitus of the goods was at an end as to him, on there arriving there; and that

he, therefore, could not stop them afterwards on their way to London.

Lord Gifford, C. J. Can it be contended, that, in every part of the journey to the consignee, *Hutchinson*, the consignor, may not stop them in transitu?

BURROUGH, J. I think that justice has been done in this case. Lord GIFFORD. C. J. Brother *Taddy*, the Court is against you.

Rule refused.

† In the Court of Common Pleas, it is necessary to give two days' notice at the chambers of the Judge who tried the cause, of your intention to move for a new trial.

[*Special Jury.]

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WOOD, assignee of HALL v. WOOD.

The usage of a trade must be certain and uniform, to make it binding on transactions in such trade.

TROVER for cloth. On the part of the plaintiff, after proof of the bankruptcy, it was proved that, at the time of his bankruptcy, the bankrupt had this cloth in his possession, he trading in that article; and that the defendant got it into his possession and would not give it up.

The defence set up, was, that the defendant, who was the owner of the cloth, had sent these cloths to the bankrupt for inspection, and that he was, by the usage of the cloth trade to send an answer to the defendant whether he would buy them or not, and that if he did not in three days say that he would buy them, the seller, by the usage of the cloth trade, was to send for, and receive them back again.

To prove this usage of the trade several witnesses were called, all of whom spoke of a usage in the cloth trade to send goods for inspection; but some of them spoke of three days as the time, within which the buyer was to say whether he would buy them or not, others spoke of a week, and one of a month, as the time.

Pell, Serjt., in reply, relied on a case being made out, under the stat. of 21 James 1, c. 19, of reputed ownership in the bankrupt, and cited a dictum of LE Blanc, J., in which that Judge laid down, that if a trader has got goods in his possession, with the option of returning goods, but does not return them

before he becomes a bankrupt, the goods will pass to his assignees, though they

made no part of the bankrupt's stock.

Burnoven, J. If goods are in the hands of a bankrupt at the time of his bankruptcy, generally speaking they will go to his assignees under the statute of James, though "there is no pretence of any sale to the bankrupt, or that they are really his property. Special facts may take a case out of this general state of things. It has been contended that in the cloth trade there is a certain usage, relative to the return of cloth sent for inspection. Such a usage must, to be binding, be uniform and universal, and not merely the way of dealing at particular houses. It must be so universal that every one in the trade must be taken to know it. If it is not so, it is no usage at all. Here there seems to be no certain rule or usage, for the witnesses do not give it as certain or uniform; but if there be such a usage, I am of opinion that it would take the case out of the statute of James.

Verdict for the plaintiff, damages 141L

Pell, Serjt., D. F. Jones, and D. Pollock, for the plaintiff. Vaughan, Serjt., and Chitty, for the defendant.

[Attornies—Sweet and Tomlinson.]

PRICE v. MARSH et al.

If an alteration has been made in the plaintiff's pass book with his bankers by some person at his bankers'; if he inquires there why it is done, the answer he receives from a person acting in the banking house as a clerk, is evidence in an action against the bankers.

Assumpsit for money had and received, with the common money counts. Plea—General issue.

The plaintiff, it appeared in evidence, was a surgeon, and the defendants were his bankers, and this action was brought to recover 50*l*., the alleged balance of his account in his favor. His servant proved the paying in 81*l*. 10s.

in a check of 51*l*. 10s. and 30*l*. in cash; and that on paying it in, so clerk in the banking-house entered in a book, which the plaintiff always sent when he paid in money, 81*l*. 10s. as so much paid in. From the evidence of another witness, it appeared, that when this book was taken several months afterwards to the banking-house, on more money being paid in, the clerks erased the figure 8 in the entry of 81*l*. 10s. and altered it into 31*l*. 10s., saying that they had made what was wrong quite right; that the next day the plaintiff called at the banking-house, and asked a person named Golightly, who was acting as a clerk there, whether they had made the alteration, and why?

Pell, Serjt., objected, that Golightly, not being a partner in the banking-house, nor a defendant on the record, what he said could not be evidence.

Burrough, J., held, that, as it appeared the alteration was made in the book at the banking-house, if the plaintiff asked a person who was acting as a clerk in the banking-house, and transacting the business there on behalf of the bankers, why an alteration of this kind had been made, his answer was certainly evidence.

His answer was then given in evidence.

The defence was, that the check of 311. 10s. only, and no cash was paid in; and several witnesses were called for the defendants.

His Lordship left the case to the jury, on the question, was 81%. 10s. paid in or not.

Verdict for the plaintiff, damages 501.

Vaughan, Serjt., and Talfourd, for the plaintiff. Pell, Serjt., for the defendants.

[Attornies—Greenfield and Seymour.]

*BEFORE GIFFORD, C. J., PARK AND BURROUGH, JS.

[.63

In Banc.

Pell, Serjt., moved for a new trial in this case, on payment of costs, on the ground that the verdict was against the weight of evidence.

But the Court refused the rule on the ground that the evidence, which was conflicting, had been left to the jury, and they could not say that the jury had come to a wrong conclusion.

BODDY v. ESDAILE et al., Assignees of Trigge.

It a person sends his servant to sell his deals at another's wharf, these deals do not pass to the assignees of the owner of the wharf, as goods in his order and disposition, under the statute 21 Jac. 1, c. 19.

Trover for deals. Plea-General issue.

The plaintiff was a timber-merchant in London; the defendants were the assignees of one Trigge, a bankrupt, who had kept a wharf at Hertford.

For the plaintiff, it appeared that the deals were his property, but he sent them to Trigge's wharf, and sent his servant named Weekes with them to look after them, and sell them as he could get customers; but Weekes always took the directions of Trigge as to whom he was to trust, and Trigge often found out customers.

For the defendants it was contended, that, under the statute of 21 James 1, c. 19, these goods passed to the assignees, as goods in the ordering and disposition of the bankrupt, at the time of his bankruptcy.

Evidence was given of the commission, and the petitioning creditor's debt, the trading, and act of bankruptcy, from the proceedings under the commission, no notice having been given to dispute them under the statute 49 Geo. 3, c. 121. Evidence was also given, that Trigge gave orders respecting the sale of a part of the deals.

BURROUGH, J., told the jury, that if the plaintiff sent down his servant with the goods, and the bankrupt was only employed to find out customers, the bankrupt had no possession of the goods, and they would not pass to his

assignees.

Verdict for the plaintiff.

Taddy, Serjt., for the plaintiff. Pell, Serjt., for the defendants.

BEFORE GIFFORD, C. J., PARK AND BURROUGH, JS.

In Banc.

Pell, Serjt., now moved for a new trial, on the ground of misdirection of the learned Judge, and that the verdict was against evidence; and contended that a complete case, under the statute of James, had been made out; for that, by the goods lying at Trigge's wharf, he obtained credit by them, and if the sending a servant with goods, would prevent them passing to the assignees, there would be an end of all benefit from the statute of James.

GIFFORD, C. J. I conceive that the direction of the learned Judge was quite right. If the servant kept possession of the deals, it is clear that Trigge. the bankrupt, *never had them in his possession, and therefore they could not be within the statute of *James*.

PARK, J. If the possession continued in Boddy, the plaintiff, he must recover; and I feel no doubt that the learned Judge was right, in the mode in which he left the case to the jury.

The court granted a rule nisi, on the ground that the verdict was against

evidence.

COURT OF KING'S BENCH.

ADJOURNED SITTINGS AFTER MICH. TERM, AT WESTM.

BEFORE LORD CHIEF JUSTICE ABBOTT.

ARCHER v. BAMFORD.

Practice.—If a cause has been made a special jury cause, but the special jury have not been summoned, the Ld. Ch. J. will take it at the end of the day on which it would have been tried by the special jury, and not let it remain till all the special juries in the list are gone through.

This case appeared in the cause list as a special jury cause; but when the special jury causes before it were disposed of, it was not called on, because no

special jury had been summoned in it.

Gazelee applied to his Lordship to take this case before all the special jury causes were disposed of, as several of the witnesses came from the country. The special jury had been applied for by the defendant, and he had not caused the special jurors to be summoned; therefore he first delayed the plaintiff by ef5] getting it made a *special jury cause, and then delayed him again by omitting to cause the special jury to be summoned.

ABBOTT, C. J. The proper way is, when in any case the special jury has not been summoned, for the case to be taken after the other special jury causes fixed for that day are disposed of, but not to make the cause wait till all the special jury causes in the whole list are tried. The reason of taking such a case at the end of the day is, not to keep the special jurors summoned in other causes in waiting longer than is necessary. This has been the practice ever since I have known Guildhall. I shall take this case at the end of the day.

The case was tried at the end of the day by a common jury.

Gazelee, and E. Lawes, for the plaintiff.

The Attorney General, Gurney, and Chitty, for the defendant.

[Attornies—Croft and Platt.]

BOLDRON v. WIDDOWS.

Evidence.—Slander of a school for filth and bad food; which was justified. To rebut the justifications, the plaintiff's counsel cannot ask how boys are treated at any other particular school; nor can he ask as to the manner of their education, because it was not called in question by the slander.

This was an action for defamation. The declaration stated that the plaintiff kept a school, and had divers scholars, and that the defendant spoke of him in his business of a schoolmaster certain words there set out. The words were variously laid in different counts; but they were in substance, that the scholars were ill fed, and badly lodged, had had the itch, and were full of vermin. *Some of the counts laid the loss of certain scholars, as special damage. [*66 Pleas—The general issue; and justifications, that the whole of the words were true.

For the plaintiff, several witnesses proved the speaking of the words, and that the boys were boarded, educated, and clothed, by the plaintiff, at 201. a-year each, near Richmond in Yorkshire: and the usher of the school was called to prove the boys well fed and well lodged, and had no itch. In his cross-examination it appeared that there were between eighty and ninety boys; that about seventy of them had had a cutaneous disease; and that they all slept in three rooms close to the roof, with no ceiling; and that there was a general combing of the heads of the whole school every morning over a pewter dish, and that the vermin combed out were thrown into the yard; no boy was free from them. A piece of bread of a perfectly black hue was shown him: he did not think the bread in the school so black as that.

The witness having stated that he had himself been at the Appleby grammar-school, the plaintiff's counsel wished to ask him what was the quality of the provisions used by the plaintiff's school, compared with those consumed by the Appleby grammar-school.

The defendant's counsel objected to this.

ABBOTT, C. J. That cannot be asked; what is done at any particular school is not evidence. You may show the general treatment of boys at schools, and show that the plaintiff treated the boys here as well as they could be treated for 201. a-year each, for board, education, and clothes.

One of the plaintiff's scholars was then called to prove the plaintiff's good

treatment of them.

In cross-examination, the defendant's counsel wished to ask him, whether the plaintiff did not set the boys to plant potatoes in school hours?

*Assort, C. J. I do not think you can ask this; the issue here being whether the plaintiff's scholars were ill fed, badly lodged, had the itch,

and had vermin: nothing has been said as to their being badly educated. Their education is not in question here.

Gurney, for the defendant, addressed the jury, and called witnesses to prove the truth of the words.

Verdict for the plaintiff, damages 120%

Scarlett, and E. Lawes, for the plaintiff. Gurney, and Pollock, for the defendant.

BEFORE MR. JUSTICE BEST.

(Who sat for the Lord Chief Justice.)

REX v. WHITEHEAD.

Evidence.—On indictment for a conspiracy, the letters of one of the defendants to the other are under certain circumstances admissible in evidence in his favor, to show that he was the dupe of the other, and not himself a participator in any fraud.

This was an indictment against the defendant, and a clergyman named Brown, (who had gone to America,) charging them with conspiring to defraud Sir Alexander Campbell, by falsely representing the values of certain livings, tithes, and estates, the property of Brown, and falsely alleging him to be the owner of other estates, to which he had no claim; and by this representation inducing Sir A. Campbell to lend a large sum of money secured on these estates. This was the substance of the charge contained in a very long indictment, consisting of a great number of counts. Plea—Not Guilty.

This case had been formerly tried before ABBOTT, C. J., when this defendant

was found guilty; but the court above granted a new trial on affidavits.

*The solicitor of Sir A. Campbell proved that the defendant had represented to him the value of the property, and that it belonged to Brown.

The Attorney General, in cross-examination, wished to ask him, if he had not given a guarantee to Sir Alexander Campbell?

Scarlett objected, that, as this was not on voir dire, the defendant's counsel had no right to ask this without producing the written guarantee.

The learned judge overruled the question.

The partner of the last witness was then called; and the defendant's counsel wished to show that he and his partner had given a guarantee to Sir A. Campbell.

BEST, J. Even if it were so, they would still be competent witnesses on this prosecution.

This witness then proved the representations, and the falsity of them.

A number of papers, purporting to be copies and abstracts of documents relative to the title of the property, were put in. These were proved to be almost all fictitious; but, though produced by the defendant to Sir A. Campbell's solicitor, they were proved to be nearly all in the hand-writing of Brown.

Witnesses were then called to prove the falsehood of the representations.

The evidence of a witness, examined for the prosecution on the former trial,

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but who had since died, was read from the Lord Chief Justice's notes, by order of the Court above.

The defence was, that this defendant, instead of being a participator in the guilt of *Brown*, was really acting *bona fide*, and was himself deceived.

To substantiate this, witnesses were called, who proved *that Brown was a clergyman, and was most respectably connected, and that he made to the defendant similar representations of his property to those that the defendant made to Sir A. Campbell's solicitor.

The Attorney General then offered to put in the whole of the correspondence between Brown and the defendant, at and about the time of the negotiation.

Scarlett objected, that though the letters being between two persons jointly indicted for a conspiracy might be evidence against them, still they could not be evidence for them.

The Attorney General. The question is, whether the defendant's acts and representations were done and made bona fide, by him, or with a fraudulent intent. It is also material for him to show by these letters, that Brown made representations to the defendant, similar to those the defendant made to the agents of Sir A. Campbell.

BEST, J. I think them admissible; for what the parties say at the time, is

evidence to show how they acted.

The letters were then read.

BEST, J. Left it to the jury to say on this evidence, whether they believed that the defendant joined with *Brown* to defraud Sir A. Campbell, or whether the defendant was innocent of the fraud, and himself deceived by the representations of Brown.

The jury acquitted the defendant.

Scarlett, the Common Serjeant, and Curwood, for the plaintiff. The Attorney General, and Gurney, for the defendant.

[Attornies—M'Dougall and Saggers.]

*In this vacation, Lord Chief Justice Dallas having resigned, Sir. Robert Gifford, Knight, his Majesty's Attorney General, was appointed Lord Chief Justice of the Court of Common Pleas. Sir John Singleton Copley, Knight, was appointed Attorney General, vice Sir Robert Gifford; and Charles Wetherell, Esq., one of his Majesty's counsel, was appointed Solicitor General, vice Sir John Singleton Copley. Lord Chief Baron Richards having died, William Alexander, Esq., one of the Masters of the Court of Chancery, was appointed Lord Chief Baron of the Court of Exchequer.

COURT OF KING'S BENCH

SITTINGS IN HILARY TERM, AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE ABBOTT.

MALTON v. NESBIT, et al.

In action for negligently steering a ship, whereby she was wrecked, and plaintiff lost his passage in her, no evidence can be given of a specific act of negligence, which is not the foundation of the action. You may give evidence, that the captain had often expressed his conviction, that the officer to whom he gave charge of the ship was incompetent for that situation. You may call experienced nautical men, and ask them, whether, in their judgment, particular facts, which have been proved, amount to gross negligence.

This was an action on the case. The first count of the declaration stated, that the defendants were the owners of the ship Apollo, and that the plaintiff took his passage in that ship from Madras to London, and paid the defendants for it 1751.; and that it became the defendant's duty to carry him safely, (the acts of God, and the king's enemies, and perils of the seas excepted,) yet that, by reason of the negligence of the defendants and their servants, the ship was wrecked in Table Bay; and that the plaintiff was injured by having to pay for a passage in another ship and to stay for some time at the Cape of Good Hope. This was varied in three other special counts, and there was also a count in trover. Plea—Not guilty.

To show that the defendants were the owners of the ship, a clerk from the Custom-house produced an affidavit made by them under the register acts.

An officer of the navy, who was a passenger in the Apollo, was called to prove the negligence of the captain and crew. He was proceeding to state their negligent conduct at an earlier part of the day, on which the accident happened, but—

ABBOTT, C. J., held, no evidence could be given of a specific negligence,

which was not the ground of the present action.

This witness was then asked who had the charge of the watch at the time the ship was wrecked. He stated that it was the second mate; and that he had both before and after the wreck heard the captain say, that the second mate was wholly incompetent to have the charge of the watch.

Scarlett objected to these statements of the captain being received in evidence.

ABBOTT, C. J. I must receive this evidence. The captain leaves the ship in the charge of a person he himself considers incompetent: this is certainly evidence of negligence on his part.

Evidence was given, that, for some hours before the wreck, the ship was in *Table Bay*, and no soundings were made, nor look-out kept. This was confirmed by many witnesses. Evidence was also given of the expense and state of the ship.

A witness was then called, who stated that he had been a master in

the navy for seventeen years.

The plaintiff's counsel wished to ask him, as a man of experience in nauti-

cal matters, whether, supposing the facts as proved to have occurred, they showed negligence in the captain.

Scarlett objected; but-

ABBOTT, C. J., held, that the plaintiff's counsel might state to the witness what had been done, and might ask him if an officer of competent skill would have done so.

The defence was, that there was no negligence; and to prove this, the captain, chief-mate, and some of the crew (having been released) were called.

ABBOTT, C. J. Left the case to the jury, on the question of negligence, or no negligence.

Verdict for the plaintiff; damages, 120/ The Attorney General, Gurney, and Jardine, for the plaintiff. Scarlett, Adam, and Parke, for the defendant.

[Attornies-Martineau and Dinnet.]

*COURT OF COMMON PLEAS

SITTINGS IN HILARY TERM, IN LONDON.

BEFORE LORD CHIEF JUSTICE GIFFORD.

SEWELL and BRET, Assignees of Sarah and James Wright, v. STUBBS and HANCOCK.

If in conversation the opposite party states the contents of a written paper, you may give such his declaration in evidence, without producing the paper.

If a witness has given a note jointly with others for a sum of money to indemnify the defendant in the action, and his name has been erased from the note by consent of all parties to it, his competency is restored, and he may be examined for the defendant.

THE plaintiffs were assignees of the bankrupts, who had been hatters, and brought the present action to recover 1231., as money had and received, to the use of the bankrupt's estate. There were the common money counts. -General issue.

The case opened was, that, before the bankruptcy, Messrs. Philips and Dean had bought a quantity of hats of the bankrupts, to take to South America; and, after the bankruptcy, had remitted 1231. to the defendants for them to pay to the estate. The commission was put in, and the petitioning creditor's debt. The trading and act of bankruptcy were proved by the proceedings under the commission, no notice to dispute them having been given under the statute of 49 Geo. 3, c. 121.

Pell, Serjt., asked the solicitor, who produced the proceedings, whether one of the plaintiffs had not told him, that he held a note of Messrs. Philips and

Dean for 100l., part of this 123l.?

Vaughan, Serjt., objected, that the witness could not be asked the contents of the note.

GIFFORD, C. J. They may certainly ask any thing that either of the plaintiffs said.

The witness stated that one of the plaintiffs had so told him. Mr. Dean was then called: he was asked on voir dire, by Mr. Serjt. Pell, whether he had not given a note for 100l., part of this sum, as a collateral security, in case the plaintiffs failed in this action. The witness stated that he had given such a note, but that his name had been erased from the note by consent of all the parties, but that he had had no release.

GIFFORD, C. J. If his name has been erased from the note by consent of

all parties, he is a competent witness.

The witness proved the payment of the money to the defendants, for the

plaintiffs.

The defence was, that the defendants had paid the money over to the bankrupts, and that the assignees afterwards consented to discharge the defendants from their liability, and receive the money from the bankrupts. It was admitted, however, that he had never paid it over. This defence failing in proof, there was a

Verdict for the plaintiff, for 123l.

Vaughan, Serjt., and Stephen, for the plaintiff. Pell, Serjt., for the defendant.

The Right Honorable Sir Robert Gifford, Knight, Lord Chief Justice of the Court of Common Pleas, was created a peer by the style and title of Baron Gifford, of St. Leonard's, in the county of Devon.

† On weir dire, counsel are allowed to ask a witness as to the contents of written papers, to show him incompetent.

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*SITTINGS AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE GIFFORD.

EVEREST v. WOOD.

Treeer for bricks. Evidence that men fetched them away, saying they were ordered by the defendant; and evidence that the cart they took them in had on it the same name as the defendant's, is not evidence to go to the jury, that the defendant took them away.

TROVER for bricks. Plea—General issue. The plaintiff in this case proved his property in the bricks, having taken an assignment of them from a former owner of them, and also the value of them.

To prove conversion, a witness stated that some men fetched away the bricks in a cart; and on his asking them why they did so, they said they were ordered

by their master, Mr. Wood. The witness also stated that the name "James Wood" was painted on the cart. Another witness proved that he served a

demand of the bricks on the defendant.

Lord GIFFORD, C. J. What the men said is no evidence against the defendant; and the name "James Wood" on the cart might be the name of any other "James Wood." There is no evidence to connect the defendant with the transaction: I must nonsuit the plaintiff.

Plaintiff nonsuited.

Vaughan, Serjt., and Platt, for the plaintiff. Taddy, Serjt., and Comyn, for the defendant.

[Attornies—Carpenter and Sheppard.]

*GOODMAN v. LOVE.

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The defendant having contracted to rebuild a house, employed the plaintiff to do the brick-layer's work. The owner of the house, who had paid neither of them, is a competent witness to prove that the plaintiff did the work.

Assumpsit for work and labor, with the common money counts. Plea-General issue.

The case opened for the plaintiff was, that the defendant, having contracted to rebuild a public house called the Blue Posts, employed the plaintiff to do the bricklayer's work.

To prove that the plaintiff had done the work, his counsel called the owner

of the Blue Posts, who had not paid any one for the work.

Vaughan, Serjt., objected that this witness was incompetent, because he was to prove that work had been done at his house, and that some one else (the defendant) was liable to pay for it,

Lord GIFFORD, C. J. The witness's interest is equal, for the witness is liable to pay some one, and he is indifferent, whether he pays the plaintiff or

the defendant.

Verdict for the plaintiff, for 170%.

Pell, Serjt., and Storks, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies—Carlos and Jones.]

*SITTINGS IN LONDON.

BEFORE LORD CHIEF JUSTICE GIFFORD.

RAWSON et al. Assignees of WILKINSON v. HAIGH, Executor of HAIGH.

Scale, that a letter written by a bankrupt shortly after absenting himself from home, is evidence to show his motive in going, but not to prove the fact of his absence.

Assumpsit for goods sold by the bankrupt to the defendant's testator.

No notice had been given of the defendant's intention of disputing either

the trading, petitioning creditor's debt, or act of bankruptcy.

The solicitor to the commission put in the commission and proceedings under it. The commission was dated 6th Septr., 1822. The petioning creditor's debt was clearly proved by his deposition under the commission. The proof of the act of bankruptcy was also from the depositions under the commission. A witness, named Llewellyn deposed, that the bankrupt made an appointment to meet the witness on the 3rd of July, 1822, to settle an account in which the bankrupt was interested, but on which the bankrupt owed nothing, and that a letter (annexed to the deposition) was received from the bankrupt, stating that urgent business obliged him to go to France. This letter had an inland post mark, but no foreign one; the postage charged on it was one shilling.

Another letter from the bankrupt was read, it was dated August, 1822, it stated that for fear of being arrested, he should be obliged to remain in Paris.

Vaughan, Serjt., objected that this letter was not evidence; and if it was, the whole amounted to nothing; for though the motive of a bankrupt's absence might be proved by his letters, the fact of his absence could not be so *78] *proved; but here almost every thing is to be proved by the bankrupt's letters, though not a word of it could be proved by his providence.

Pell, Serjt., contra, the objection is, that the bankrupt cannot be permitted to say, "I was absent at such a particular time," though he might declare his motive for his absence; but here Llewellyn proves his absence in July, and his letter in August shows that he was absent to avoid his creditors; and cited Maylin v. Eyloe, 2 Str. 809, and Bateman v. Baylis, 5 T. R. 512.

Lord Gippone. Supposing that, instead of the deposition, a witness had proved that the bankrupt had said that he was absent at *Paris* to avoid his

creditors, would that be sufficient?

Pell, Serjt., answered in the negative.

Lord GIFFORD. The allowing the letter as proof, would at once let in the

bankrupt to prove his own act of bankruptcy.

F. Pollock, contended, that there was at least evidence to go to the jury of an act of bankruptcy, for they had evidence that the bankrupt did not keep his appointment, and a letter in excuse sent from a distant place, as appears by the charge of a shilling for postage. In order to prove a man out of London, it is not necessary to call a person who saw him in some other place: if a letter in the hand-writing of the person is received, bearing the post mark of any other place, a jury may fairly presume that the writer is at that place.

Vaughan, Serjt., contended, that there was not a scintilla of evidence of the set of bankruptcy, except the letters. If the plaintiffs fix the date of the act of bankruptcy at the time of the breach of appointment, in July, *then that absence is explained by the first letter, which states that the reason

of it was urgent business; if they fix the date of it in August, then there is only the last letter to prove both the fact of absence, and the motive for it.

Lord Gifford. The letter in August, is too distant from the breach of appointment in July to be considered as explaining the motive of that absence. There was a case at Exeter, in which a bankrupt's declaration, made a day or two after his absenting himself from home, was admitted as evidence of the motive of the absence; but there was considerable difficulty in getting the declaration admitted in evidence, though so very near in point of time.

The plaintiff's counsel, to carry the case further, called a witness, who stated, that in July, 1822, he called three times at the bankrupt's counting-house; he

could never see him, but always saw the bankrupt's brother.

Vaughan, Serjt., objected, that there was no proof that his brother was his

agent.

Pell, Serjt., the witness goes three times to make inquiries at the place where the business was carried on. The answer of the person at the place is evidence as to whether the person inquired for, is at home or not; valeat quantum.

Lord Gifford. Thought it admissible, and gave Vaughan, Serjt., leave to move to enter a nonsuit, if the Court should think the proof of the act of bank-

ruptcy insufficient.

The plaintiff's counsel saying that their attention had never been called to the proof of the act of bankruptcy, on the proceedings under the commission—

Lord Gifford. Observed, that it was often supposed that when no notice was given of disputing the act of bankruptcy, it was intended to be admitted; but the truth was, that the only difference made by the act, was, that the depositions were made evidence, where there was no notice to dispute; but upon the depositions, as good an act of bankruptcy must be shown as if there was notice, and witnesses called to prove the act of bankruptcy.

To prove the debt for which the action was brought, a witness proved that

the defendant admitted it.

The defence was, that the supposed admission was made, while a negotiation for a compromise was pending; but this was not made out in proof.

Verdict for the plaintiffs.

Pell, Serjt., and F. Pollock, for the plaintiff. Vaughan, Serjt., and Evans, for the defendant.

[Attornies—James and Clark.]

HILL v. SANDERS.

In action of covenant, in setting out the deed, if the word "an," is written instead of "one;" and the name "Burl" written instead of "Burl:" these are not fatal variances. Nor is the stating a lease to be for 21 years, and proving it to be 21 years determinable at the option of either party at the end of 7 or 14 years. If the defendant alleges a seizin in fee by it, and the plaintiff in the replication traverse the plea, he is at liberty to show that A. had only an estate for life, and need not reply that specially.

This was an action of covenant for rent. Pleas—After over of the deed; 1st, Non est factum; 2nd, A plea, which had been demurred to; 3rd, That the plaintiff was entitled only in right of his wife, who had died without issue, whereby John Acton, her heir at law, had become seized; 4th, That no rent was due to the plaintiff.

The execution of the deed having been proved, it was read; it was a lease for twenty-one years, of lands at *Henbury*, from the plaintiff and his wife to the defendant.

The defendant's counsel checked it with the record, whose it was set out as

the oyer; and-

*E. Lawes, objected, that "an" was written for "one;" and the name "Burl" was written for "Burt," the t not being crossed, which he contended were fatal variances.

These objections were overruled by the Lord Chief Justice.

Lauce, Serjt., then submitted, that the plaintiff must be nonsuited on the ground of variance, because the demising parties were stated on the record to be the plaintiff and his wife: now this was not supported, because a feme-covert cannot be a demising party; therefore, in construction of law, this is only the demise of the husband alone, and cited the case of Arnold v. Revolt, (1 Brod. & B. 443.) In that case a nonsuit had been directed, because the lease was from the husband and wife, and was stated on the record to be the lease of the husband only. But the court set aside the nonsuit on the ground, that in law it was the lease of the husband only, and therefore the legal effect had been properly stated.

The learned Serjeant's next objection was, that the deed in evidence was a lease for twenty-one years, determinable at the end of seven or fourteen years, at the option of either party. The lease declared on was only stated to be a

lease for twenty-one years.

Lord GIFFORD, C. J. I think that will do; and if there be any thing in the other objection, it is on the record, and you may move in arrest of judgment.

Lances, Serjt., addressed the jury for the defendant, and stated, that the plaintiff's wife took under the will of Mrs. Brook; and that the property descended to Mrs. Hill's heir at law, on her death.

A witness produced the original will of Mrs Brook, from the registry of the diocese of Worcester; it was dated Nov. 7, 1785: the property was devised by it to Mrs. Hill, by the name of Nancy Acton.

A witness produced examined copies of the parish registers of Tiverton, to prove the burials, of Mrs. Brook in 1787, and of Mrs. Hill, in 1817.

In reply, the plaintiff's counsel called a witness, who proved and put in a

deed, dated 24th of June, 1794.

This was the marriage settlement of Mr. and Mrs. Hill; in this an estate for life in the premises in question was limited to the plaintiff, after the death of his wife.

Lawes, Serjt., objected, that after they had proved a seizin in fee by descent, the plaintiff's counsel could not produce evidence of a particular interest, without replying it on the record.

Lord GIFFORD, C. J. They may show that Mrs. Hill was not seized in see, for they traverse your plea. In my opinion the plaintiff had made out his case.

Verdict for the plaintiff.

Vaughan, Serjt., and Russel, for the plaintiff. Laws, Serjt., and E. Laws, for the defendant.

[Attornies-Hill and Bounfield.]

OXFORD SUMMER CIRCUIT.

1823.

BEFORE MR. JUSTICE PARK, AND MR. BARON HULLOCK.

ABINGDON ASSIZES.

BEFORE MR. BARON HULLOCK.

REX v. BENJAMIN MILLINGTON.

Expenses of witness going to identify stolen property disallowed.

This prisoner was convicted of stealing a horse. Rigby, in applying for the expenses, asked to be allowed for witnesses going from Compton, in Somersetshire, to Easthampstead, in Berkshire, to identify the horse, soon after the prisoner was apprehended, in addition to the usual charges.

HULLOCK, B. I have no power to allow those charges. I can only allow the expenses of the prosecution.

[†] The statute of 58 Geo. 3, c. 70, empowers, in prosecutions for felony, the Court to allow, at the request of the prosecutor, or of any person subpensed or bound over 10 give evidence, or of any person who has been instrumental in the apprehension of the prisoner, "the costs of preferring the indictment or indictments, and a reasonable sum, or sums, to reimburse the prosecutor, and witnesses or persons concerned in apprehending, for their expenses in preferring the indictment, and otherwise carrying on the prosecution, and also to compensate the prosecutor, witnesses, and persons concerned in the apprehending, for their trouble and loss of time in such apprehension and prosecution as aforesaid." By \$ 5, the expenses to persons apprehending are to be paid by the sheriff. And by \$ 6, expenses to prosecutors and witnesses are to be paid by the treasurer of the county.

*REX v. THOMAS SIMMONDS.

Ibough the counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, the judge will sometimes call those omitted to be called by the prosecution.

THE prisoner was indicted for stealing a mare. When the counsel for his prosecution had closed his case—

HULLOCK, B. Observed, that there was the name of another witness, (who had not been called,) on the back of the indictment.

The counsel for the prosecution declined calling him.

HULLOCK, B. Though the counsel for the prosecution is not bound to call every witness, whose name is on the back of the indictment, it is usual for him to do so: and if he does not, I, as the judge, will call the witness, that the prisoner's counsel may have an opportunity of cross-examining him.†

*85] *The witness was then called by the counsel for the prosecution.

Verdict—Guilty.

Shepherd, for the prosecution. Carrington, for the prisoner.

[Attornies — and Frankum.]

In the case of Rex v. Robert Whitbread, C. B., June, 1823, for larceny, (M. S.,) Alley, for the prosecution, omitted to call an apprentice of the prosecutor, who had been implicated in the theft, and was examined at the police office, and before the grand jury, and whose name was on the back of the indictment. Andrews, for the prisoner, contended, that the witness ought to be called, as he was on the back of the indictment. Alley refused to call him, saying, that the prisoner's counsel might himself call him if he chose. Holroyd, J., and Burresgh, J., held, that the prosecutor's counsel are not less to call all the witnesses, whose names are on the back of the indictment, merely to let the other side cross-examine them. The witness was not called at all. However, at the Werester Sum. Ass. 1823, Park, J., in the case of Rex v. John Taylor, for larceny, called all the witnesses on the back of the indictment, whom the prosecutor had not called, merely to allow the prisoner's counsel to cross-examine them. It seems more conducive to the discovery of truth, to call every one who has ever been a witness in the case, than to allow the prosecutor to select his witnesses, and keep back any one whom he considers unfavorable to his prosecution. As to the prisoner's counsel calling them, in general he would be very unwise to risk, as his witness, any man who has ever been thought of as a witness in support of the prosecution.

REX v. SARAH PITCHER.

Os indictment of a female prisoner for stealing from the person, in a house, you cannot sak the prosecutor, in cross-examination,—" Whether at that house any thing improper passed between him and the prisoner?"

Thus prisoner was indicted for stealing the prosecutor's watch from his person.

The prosecutor stated, that the prisoner stole his watch from him, at a house near Ascot Heath race-course.

In the cross-examination of the prosecutor, he admitted that he walked with the prisoner on Ascot Heath race-course, and that he had never seen her before; that they went together to a house, not a public house, into which he had never been before, and of which he knew not the occupier. At this house he seerted that he lost his watch.

The prisoner's counsel wished to ask him, if "at that house any thing improper passed between him and the prisoner?"

HULLOCK, B., held, that the question ought not to be put.†

Verdict—Not Guilty.

Rigby, for the prosecution. Carrington, for the prisoner.

[Attornies — and Frankum.]

The law as to what questions may be asked in cross-examination, the answers to which have a direct tendency to degrade the witness, is very obscurely laid down in the books: and if they are permitted to be asked, there is equal obscurity, whether the witness shall be excused from answering. As to whether a witness is compellable to answer degrading questions, in the case of Cooks, and the case of Sir John Freind, for high treason, Treby, C. J., laid down, that a witness is not bound to answer that will subject him to penalties or infamy." In Layer's case the Judges appear to be of the same opinion. All these cases are reported at hige in the state triels. As to what questions will be allowed to be put: In the case of Macbride v. Macbride, 4 Esp. Rep., which was an sction of assumpsit, a female, who had proved the plaintiff's demand, was cross-examined as to whether she was not in keeping of the plaintiff; and Lord Alvanley overruled the question. on the ground that a witness cannot be asked questions to degrade his character: and in Res v. Levis, 4 Esp. Rep. which was an indictment for an assult, Lord Ellenborough would not permit the prosecutor to be asked whether he had been in the house of correction. However, on the other hand, there are the cases of the King v. E. Edwards, 4 Ter. Rep. 440, and that of Dr. Watson, tried at bar for high treason. The first was an examination of persons who were tendered as bail for the prisoner, who was charged with a larceny. The Court allowed one of them to be asked, if he had ever stood in the pillory for perjury; and in the latter case Mr. Wetherell, for the prisoner, who was charged with a larceny. The Court allowed one of them to be asked, if he had ever stood in the pillory for perjury; and in the latter case Mr. Wetherell, for the prisoner, who witness named Castles, all sorts of degrading questions. In practice, the asking of questions to degrade the witness is regulated by the discretion of the learned judge, in each particular case: for in the case of Res v. John B

REX v. JOHN BARNARD, JOHN FARMER, and JOHN BED-FORD.—For a Burglary.

Moving to admit king's evidence. Corroboration of accomplice's evidence need not be on every material point.

In this case, before the bill was presented to the Grand Jury, Shepherd stated to the Court, that he had read over the depositions taken before the Magistrate, and that in his opinion there was not sufficient evidence against the prisoners, without admitting an accomplice named Herbert, as king's evidence.

HULLOCK, B. Let it be so.

*The bill having been found, the accomplice was called for the prosecution, and a good deal shaken in his cross-examination; but was con-

firmed on several material points, by other witnesses.

HULLOCK, B., in summing up, said, that he would never advise a jury to find prisoners guilty, on the evidence of an accomplice without corroboration; but it was not necessary that he should be corroborated on every material point, as, then, his evidence would be superfluous; but he must be confirmed in such, and so many material ponits, as to convince the jury that his statement was the truth.i

*Verdict-Guilty; against Barnard and Parmer. Bedford not *89]

Guilty.

Shepherd, for the prosecution. Bicheno, for the prisoner Barnard. Carrington, for the prisoner Farmer. Rigby, for the prisoner Bedford.

[Attorney for prisoner Barnard, Lloyd; for the other two Frankum.]

† The way to get an accomplice admitted king's evidence, is shefore you present your bill to the Grand Jury, to get your counsel to read over the depositions: he then in court states to the Judge, that, having read them over, he conceives he cannot asfely go on, unless A. B., one of the prisoners, is admitted king's evidence. If this is granted, which is almost a matter of course, the attorney gets an order from the clerk of assize, directing the jailer to take the king's evidence before the Grand Jury: you then present your bill the Canad Jury:

to the Grand Jury in the usual manner.

‡ I apprehend that a king's evidence, being a competent witness, a jury, if they believe bim. may legally convict on his evidence unconfirmed; though the Judge always advises them, under such circumstances, to acquit. In modern practice, no conviction takes place, without some confirmation of the king's evidence. In Res v. Rudd, Cowp. Rep. 336, Lord Manafeld says, that "though these witnesses are clearly competent, their single testimeny is seldom alone sufficient for a jury to convict upon." In Jerdayn v. Lashbrook, 7 Tor. Rep. 609, Gross, J., cites the case of Res v. Atwood et al., before Buller, I., Somewast Summer Ass. 1787; where the prisoners were convicted of a robbery, on the evidence sals of an accomplice, unconfirmed by any other witness, as to their identity. In 1 considered Ass. 1787; where the prisoners were convicted of a robbery, on the evidence only of an accomplice, unconfirmed by any other witness, as to their identity. In Hale, P. C. 303, in the case of Res v. Tonge, for high treason, the Judges held that an accomplice was a competent witness to be one of the two witnesses to prove high-treason, and that the jury may, as in other casea, consider of the credit of witnesses. By I Hale, P. C. 304 and 305, it appears that Mary Price was convicted of clipping the coin, on the cridence of accomplices only; as was shortly afterwards a person named Hyde, for a highway robbery. A leading modern case on this subject is Res v. Swallow and others, before a special commission at York, in 1813; there Thomson, B., laid down, that if an accomplice giving expidence against several prisoners, is confirmed as to some of the prisaccomplice giving evidence against several prisoners, is confirmed as to some of the prisoners, the jury, if they believe he speaks the truth, may convict those against whom his evidence stands unconfirmed, as well as the others.

OXFORD ASSIZES.

BEFORE MR. BARON HULLOCK.

DAVENPORT v. RACKSTROW, Gent., one, &c.

An estensible partner proved not to be really a partner, need not join in actions on contracts with the supposed firm.

This was assumpsit for a tailor's bill; and the defendant had pleaded the

general issue, and given notice of set off.

The plaintiff's son, who was called for the plaintiff, was examined on voir dire, he stated that he was not a partner with his father, though his name was used as such; his name was put to the bills, and the books were kept in the names of " Davenport and Son;" but he had no share whatever of the profits.

HULLOCK, B. If he is not a partner, he is a competent witness; his father

merely calling him his partner, will not affect his competency.†

*He was then examined in chief, and produced a copy of the bill delivered to the defendant, notice having been given to the defendant to produce the original: he stated that the defendant had acknowledged the deli-

very, and the prices were proved to be reasonable and fair.

The defendant's set off was an attorney's bill, due from the plaintiff to the defendant, which had been taxed by the Prothonotary. A witness proved, that a paper he produced was a copy of the allocatur, the original of which was signed by the prothonotary, and had been given to the plaintiff, on whom it was admitted notice to produce it had been served.

Verdict for the plaintiff, for the balance.

Curwood and Carrington, for the plaintiff.

Cross, for the defendant.

[Attornies—Fairthorn, and Lofty, and Rackstrow.]

† The view of Mr. Cross in asking those questions on woir dire, was to show the witness incompetent, and to nonsuit the plaintiff; the action being brought by the father alone, and not by both jointly. If it had appeared, that the father and son were estensibly alone, and not by both jointly. If it had appeared, that the father and son were estemsibly partners, it would have been incumbent on the piaintiff's counsel, to have shown distinctly that the son had no share in the profits of the trade; for in the case of Teed v. Elsorthy, 14 Ea. Rep. 210, the plaintiff, a banker at Plymouth, sued the defendant for a balance of his banking account, he having overdrawn it. It appeared in evidence, that the bank traded as "John Teed, Thomas Teed, & Co." but the bank clerk stated, in the course of his evidence, that Thomas Teed, the son of the plaintiff, was aged sixteen, and clerk to an attorney, and had no concern in the bank. The Court of King's Bench ruled, that the account being in the names of John Teed, Thomas Teed, & Co. to entitle this plaintiff, John Teed,) to recover, he must distinctly prove that alone was proprietor of the funds of the bank. However, the cases of Lloyd v. Archbole, and Mawman v. Gillet, 2 Taunt. Rep. 324, decide that if a defendant contract with one person alone, and that person permits another to take the benefit of a share of his contract unknown to the defendant and, such secret partner need not join in the action. But you may compel a dormant partent, such secret partner need not join in the action. But you may compel a dormant partner as a defendant to pay you, if you can find him out, because he has had the benefit of your work.

*Doe, on the demise of ANDERSON and Elizabeth his wife v. TURNER.

A fine with proclamations by a disseiser bars ejectments, unless there has been an actual entry, to avoid its operation.

In this case the lessors of the plaintiff had proved their case, when—

Taunton, for the defence, put in an examined copy of a fine, with procla-

mations, of the premises in question, levied within five years past.

HULLOCE, B., said, that unless the lessors of the plaintiff could prove an actual entry on the premises, to avoid the effect of this fine it put an end to the present ejectment. His Lordship lamented that parties should be put to unnecessary expense, but the only thing for the lessors of the plaintiff to do, was to make an actual entry before five years from the levying the fine had expired, and then to bring a fresh ejectment.

Peake, Serjt., for the plaintiff.

Taunton, for the defendant.

† The trick of a party who has gained a tortious possession, levying a fine to turn round the lessor of the plaintiff, who, not suspecting a fine, has brought his ejectment without a previous actual entry for the purpose of avoiding such fines as the present, is in practice very often resorted to. The useless expense in coats to the plaintiff is considerable, when he is so turned round: it therefore seems to be but product in all such cases to make an actual entry, before bringing an ejectment, to prevent the success of the trick. The way to prove a fine, is to produce the foot of the fine, if you have it, which is evidence; though in all cases where the proclamations must be proved, they can only be so by an examined copy of the original roll. One who has not the foot of the fine, proves the fine by getting an office copy of it at the Chirographer's office, and examining it, as well as the proclamations, with the original. The cheapest way of getting a witness to prove, at the assizes, this or indeed any other examined copy of a record in London, is for the clerk of one of your counsel, to examine the copy with the original, and bring the copy down to the assizes.

*92] *QUARTERMAN et al. v. GREEN et al.

What notes are negotiable or transferable within the statute of 17 Geo. 2, c. 30. Quere.

This was an action on a promissory note, in the following terms.

" August 6th, 1822.

"We jointly and severally promise to pay Messrs. Quarterman and Bosoman, four pounds, sixteen shillings, six months after date.

" J. Green, jun."

For the defendants it was objected that this note was void, not being attested by a subscribing witness, under the 17 Geo. 3, cap. 30.†

† The act on which the objection was taken, 17 Geo. 3, c. 30, § 1, enacts that all notes, bills of exchange, draughts and undertakings in writing, "being negotiable or transferable, for the payment of any sum between 20s. and 51., ahall specify the names and places of abode of the persons, respectively, to whom or to whose order the same shall be made psyable, and shall bear date before, or at the time of drawing or issuing thereof; and shall be made psyable within the space of twenty-one days next after the day of the date, and shall not be transferable or negotiable, after the time thereby limited for psyment; and that every endorsement shall bear date, at or not before the time of making thereof, and shall specify the name, and abode of the persons, to whom or to whose order the money

*Hullock, B. This is a point of great importance; the act only makes void bills and notes, which are negotiable or transferable under 5l. value, if not attested, &c. I shall not now decide whether this is or is not a note negotiable or transferable. I shall direct the jury to find for the plaintiff, giving the defendant's counsel liberty to move to enter a nonsuit, if the Court above are of opinion that this note is within the act.

Verdict for the plaintiff.

Taunton, and Manley, for the plaintiffs. Peake, Serjt., and Carrington, for the defendants.

[Attornies-D. Taunton and Eyre.]

centained in every such note, &c. is to be paid, and that the signing of every such note, &c. and every endorsement, shall be attested by one subscribing witness at least." That a note in the form of that in the principal case, (that is, without the words bearer or order.) is a legal promissory note, is settled by the case of Smith v. Kendal, 6 T. R. 123; in which a number of other cases to the same effect are cited. And that for forging such a note a person may be punished, as for forging any other note, is settled by the case of Rez v. Box, 6 Taunt. 325; in which, however, the Judges say, that though it may not be a negotiable note, it is still an offence to forge it. The only case as to whether such notes are transferable or not, is Hill v. Lewis, Salk. 132, where an endorsee of a note in this form succeeded in an action against the endorser. It was objected that such a note could not be endorsed, not being payable to order or bearer, but that objection was overruled, Lord Holl saying that on such notes the endorsee might sue the endorser, but not the drawer. I believe that in the principal case, no motion to enter a monsuit was ever made.

WORCESTER ASSIZES.

HULME, Clerk. v. PARDOE, Widow.

A tithe composition, being at one undivided sum from Michaelmas to Michaelmas, the tenant going away at Lady-day, must pay up the composition to the ensuing Michaelmas

This was an action of assumpsit, for tithe composition: to which the general issue was pleaded. It appeared in evidence that Mrs. Pardoe had agree is with the plaintiff to pay a tithe composition of 25l. a-year from Michaelmas to Michaelmas. At Lady-day, 1822, Mrs. Pardoe quitted the farm, having, however, after Lady-day, 1822, divers titheable articles on the farm, and what is termed, the way going crop. For the defendant it was contended, that she ought to pay the half year's composition, to Lady-day, 1822, and the tithe in kind of the way going crop, &c., and not the composition of the entire year, which would expire at Michaelmas, 1822.

HULLOCK, B., ruled, that as the composition was at one fixed sum, from *Michaelmas*, and the tithe year was begun, and the defendant had titheable matters on this farm, after the *Lady-day*, when it was contended the composition expired by her going away; she was bound to pay the whole year's composition, up to *Michaelmas*, 1822. However, he gave the defendant leave to enter nonsuit, if the Court above should be of a contrary opinion, as it would save the expense of another trial.

Verdict for the plaintaff.

TURBERVILLE v. WHITEHOUSE.

As mant is suable for so much of goods supplied to him to trade with, as were consumed as necessaries in his own family.

Assument for goods sold and delivered. Pleas-The general issue and infancy: replication, necessaries.

The plaintiff was a wholesale grocer, at Worcester; and the defendant, a

retail grocer.

The delivery of the goods, (groceries in considerable quantities, for the defendant's shop,) was proved in the usual way. When-

HULLOCK, B., intimated, that if the defendant was really *an infant, this evidence would not support the action; as no action could be maintained for goods supplied to an infant, for him to trade with.

Evidence was then given, to show that the tea, sugar, &c. used by the defendant, in his housekeeping, was a part of the goods supplied by the plaintiff.†

HULLOCK, B., on this evidence, left it to the jury, to say, whether any, and what part of the goods, supplied by the plaintiff had been used by the defendent's family.

Verdict for the plaintiff, damages 10%.

Russel, and Ryan, for the plaintiff. Campbell, for the defendant.

[Attornics—Edmunds and France.]

† It has long been settled, that infancy is a good bar to an action for goods sold to an infant, for him to trade with. A defendant may either plead infancy specially, or avail himself of his infancy, under the general issue. The advantage of pleading it specially is, that the plaintiff must reply—necessaries, a promise since majority, &c. which shows the defendant what ground the plaintiff means to rely on, in answer to his plea of infancy and also a plaintiff replying necessaries, or any other single ground of reply, cannot go into other grounds, to avoid the plea of infancy. It is the understanding, at the offices, that the plea of infancy must be signed by Counsel: and in practice it is so. Though, in some (and perhaps all,) the edition's of Impey's Practice it is stated to require no such signature.

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(*Crown side.)

BEFORE MR. JUSTICE PARK.

REX v. JAMES POWELL.

In frivolous cases of felony, the judge will not allow the prosecutor's expenses, though he was bound over by a magistrate.

Tam prisoner was acquitted, on a charge of stealing two hen-eggs.

Male applied for the expenses of the prosecution.

PARE, J. In such a case as this, I certainly shall not allow the expenses. Vol. XII.—9

Male, observed that the magistrate, (Rev. Lord Aston,) had felt it his duty to bind over his client to prosecute.

PARE, J. If the magistrate felt it his duty to bind you over to prosecute, I feel it mine, not to charge the county with the expenses of such a prosecution. Expenses disallowed.

† An understanding having pretty generally prevailed, that in prosecutions, however frivolous, the judge would allow the expenses, if a magistrate had bound over the parties, I thought it right to take a note of this case. The act of 58 Geo. 3, c. 70, leaves it perfeetly in the discretion of the judge.

*REX v. ELIZABETH GIBBONS.

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Medical persons are bound to reveal confidential communications, when called upon in courts of justice.

The confession of a prisoner is evidence, though previous to it an inducement to confess had been held out by another person, if that person had no authority.

This prisoner was indicted for the murder of her bastard child. Mr. Cozens, a surgeon, was called to prove certain confessions made by the prisoner to him. The witness objected to giving such evidence, on the ground, that, at the time of the statement, he was attending the prisoner in the capacity

of a surgeon.

PARK, J. That is no sufficient reason to prevent a disclosure for the purposes of justice.†

The witness also stated, that he had held out no threat or promise to induce her to confess; but a woman who was present said, that she had told the prisoner she had better tell all; and then the prisoner make certain confessions to the witness.

Campbell objected, that, as the confession was made after an inducement held out, it could not be received in evidence.

PARK, J., after consulting with HULLOCK, B., laid down, that, as no inducement had been held out by Mr. Cozens, to whom the confession was made; and the only inducement had been held out (as was alleged) by a person having no sort of authority; it must be presumed that the confession to Mr. Cozens was a free and *voluntary confession. If the promise had been held out by any person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here some person, having no authority of any sort, officiously says, you had better confess. No confession follows; but some time afterwards, to another person (the witness,) the prisoner, without any inducement held out, confesses. They (the judges) had not the least doubt that the present evidence was admissible.

It was accordingly admitted.

The prisoner was acquitted on other grounds.

Peake, Serjt., and Ryan, for the prosecution. Campbell, for the prisoner.

[Attornies—Hallen and —...]

fession, if it appears to have been made in consequence of a previous threat or promise, by

[†] The only communications privileged, are those to counsel, attornies, and solicitors, entrusted with the communications as such. A leading case on the subject is Wilson v. Restall, 4 Ter. Rep. 759. That a medical man is bound to disclose communications made to him professionally, was decided in the Dutchess of Kingston's case.

‡ As to the admissibility of confessions, the rule is, that the judge will not admit a constant of the subject of the professional decided in the p

a person who may be supposed to have some authority or influence. In Res v. Hardwick, before Weed, B., at Nottinghem, 1811, a confession before a magistrate was objected to; the counsel for the prisoner offering to prove that the constable's wife had told him previously, that he had better confess. Weed, B., overruled the objection, and admitted the confession; which could only have been admissible on the ground that the constable's wife was a person not having authority or influence. I believe no case has decided that a confession to a person in no authority, after threat or promise by that person, is admissible in evidence.

REX v. THOMAS PIGEON.

A person whose name is forged, is a competent witness to prove the forgery, if released.

This prisoner was indicted for uttering checks, purporting to be drawn by Messrs. Hailes & Co. on Sir. Wm. Curtis & Co., knowing them to be forged.

*The prisoner, it was alleged, got these forged checks discounted at Messrs. Whitehead & Co's bank, at Shipston upon Stour; and when presented at Sir Wm. Curtis's, the checks were returned as forgeries.

Mr. Hailes, one of the partners of the house of Hailes & Co., having been released by Whitehead & Co., was called to prove that the signature, "Hailes & Co.," was forged, not being of the hand-writing of the firm, or of any one authorised by them.

The prisoner was acquitted; because the clerk of Messrs. Whitehead was a Quaker, and the uttering could not be proved.

Russel, and Shutt, for the prosecution. Curwood, and Godson, for the prisoner.

[Attornies — and Godson.]

In general, a person whose name to a note or bill is forged, is incompetent to prove the forgery; because his interest is to prove it forged, as it discharges his liability to pay it; but if the person to whom he would have to pay it, if genuine, releases him, he is then competent. But in the King v. Treble, before the twelve Judges, in 1810, it was ruled, that if the forgery is by altering a good bill, by giving it a better credit in any way, without altering the drawer's liability, whose signature is admitted to be genuine; the drawer is a competent witness. The forgery in that case was the insertion of a solvent Lendon banker's, as the place of payment, instead of an insolvent banker in town; and the drawer was held a competent witness.

*STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PARK.

BATE, Widow, v. HILL.

Witnesses cannot be cross-examined to facts not in issue, if such facts are injurious to the characters of persons not connected with the cause.

In seduction cases the plaintiff's counsel may call witnesses to the general good character of the party seduced, if her character has been attacked in cross-examination.

This was an action for seducing the plaintiff's daughter. In cross-examination, the daughter admitted, that she was on intimate terms with a Miss Atkinson. The defendant's counsel wished to ask whether Miss Atkinson had not had a child. This question was held improper by Park, J., who said, that Miss Atkinson, being in no way a party to this cause, he was bound to protect her character from attacks of this sort.

The whole of the cross-examination went to show, that the plaintiff's daughter had conducted herself immodestly towards the defendant before the seduction, and that she kept improper company. Several witnesses were then called, on the part of the plaintiff, to prove the general good character, and modest deportment of the plaintiff's daughter, and the general respectibility of the family.†

The defendant called no witnesses.

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Verdict for the plaintiff, damages, 501.

Jervis, and Russel, for the plaintiff. Pearson, for the defendant.

[Attornies-Hunt and Wood.]

† This controverts the case of Dodd v. Norris, 3 Camp. N. P. C. 519, where Lord Ellenborough ruled, that witnesses, to show the general good character of the daughter, could only be called, if her character had been attacked by witnesses called for the defendant, to prove her general bad character; but if her character was only attacked in her cross-examination, the plaintiff's counsel were only entitled to set it right by her re-examination, and not to call witnesses to give her a good character: and in that case, her character having been attacked only in her cross-examination, Lord Ellesborough refused to allow witnesses to be called by the plaintiff's counsel in favor of her general character. The course allowed by Mr. Justice Park, in the present case is much more conducive to the attainment of justice; for it can signify very little, whether the daughter's character is attacked, to give further evidence, so it must be in the other. Lord Ellenborough says, that it is to be set right in re-examination: this looks very well in theory. Those used to Courts of Justice well know, that if the character of a party seduced is attacked in her cross-examination, though the witness may deny the things insinuated, a Jury very often believe, that, though denied, there is some foundation for the insinuation, if witnesses are not called to convince them of the contrary. It is a little too much, to allow a defendant to blast the character of a person he has seduced by insinuations, and then not to allow her to clear her character by the best means in her power.

BARKER v. TAYLOR.

Guardians of a female under age are justified in stopping her elopement, and in detaining her clothes if she has eloped; and a carrier by whom she has sent them is justified in delivering them up to the guardians.

This was an action of trover for a box of clothes, brought by Elizabeth

Barker, who sued by prochein ami.

The evidence was, that the defendant was a carrier; and a servant of the plaintiff's mother proved the taking the box to the defendant, who promised to deliver it as directed, which was to a milliner's in Newcastle under Lyme. The milliner proved the non-delivery, and a clerk to the plaintiff's attorney proved a demand of the box from the defendant, previous to the action. Some evidence was given to show that the plaintiff herself had bought the clothes contained in the box.t

*The defence put in proof was, that the plaintiff had eloped from home, with the assistance of an attorney's clerk, whose acquaintance with the plaintiff (who was under age,) her mother disapproved of. mother set off in pursuit of her, and on the road overtook the defendants cart, in which she recognised the box. On her stating the circumstances of the elopement to the defendant, he gave up the box to her: most of this was proved by the plaintiff's mother, who, on voir dire, stated that she had given no promise to indemnify the defendant.‡ She was therefore admitted as a witness, without any release. The other facts were brought out from the plaintiff's witnesses in cross-examination.

PARK, J., suggested a compromise, which, having been agreed to, his Lordship observed, that he was decidedly of opinion, that in any case, where a female under age attempted an elopement with a person, disapproved of by those under whose guardianship she properly was, they (the guardians) would be perfectly justified in preventing such elopement; and it was equally clear to him, that they would be justified in stopping her clothes. Being of that opinion, he must have held, if the present case had not been compromised, that the carrier was guilty of no tortious conversion in delivering up the plaintiff's clothes to her mother.

A Juror was withdrawn.

*Taunton, and Russel, for the plaintiff. Pearson, for the defendant.

[Attornies—Harding and Stanley.]

† In all cases of trover, the defendant must be guilty of an injurious conversion, which has been a tortious taking by the defendant, a demand is not necessary, though it is safer.

Bess v. Johnson, 5 Burr. Rep. 2825, decides, that, if the defendant, (there a wharfinger,) had unavoidably lost the goods, that is such an excuse, as to make the refusal to deliver them not tortious. In other cases, other reasons in excuse have been held sufficient, of which the principal case is an example.

Twhere, on seir dire, it has appeared that a witness has promised to pay the expenses of the party who calls him, to make him competent, the party usually gives him a release of all promises. It is also not uncommon on soir dire to find that a witness has subscribed towards the carrying on of the cause. This makes him incompetent; but he is usually rendered admissible by the party, or his attorney, returning him the sum he has subscribed

ASTLE et al. v. THOMAS et al.

A parish may legally have two divisions, with churchwardens keeping separate accounts, for each division.

This was an action for money had and received; in which the general issue

was pleaded.

It appeared in evidence, that the parish of Burton on Trent was divided into two tithings, each of which had always elected two churchwardens; who raised separate rates, and kept separate accounts, and were in all respects distinct from the churchwardens of the other tithing. The plaintiffs were the present churchwardens of one of the tithings; and the defendants were their predecessors in office, as churchwardens of that tithing.

This action was brought to recover an alleged balance, in favor of the parish, in the accounts of the defendants: this sum, however, appeared to have been spent on a parish feast. The defendants' counsel did not contend, that churchwardens were justified in laying out the money of the parish in a feast; there-

fore this sum was treated as money in the defendants' hands; but-

Taunton, contended, that the two plaintiffs could not maintain this action, but that the two present churchwardens of the other tithing ought to have joined in it; because, by law, churchwardens could not be churchwardens of a district or tithing, but were so of the whole parish, and therefore the action could only be maintained by all the four churchwardens of the parish joining in it. He cited the case of Spitalfields v. Bromley, (Bott. 208,) in proof of his pro-

position.

*Park, J. I think this action can be maintained in its present form; the case cited, shows that the whole of the churchwardens of the parish must act under the circumstances mentioned in that case; but I am aware of no law, which says that a parish may not have two divisions, with churchwardens keeping separate accounts. The plaintiffs were the successors of the defendants; the defendants received this money, as churchwardens of the division only, and from that division only; and are therefore liable to account for it to those who are in office for that division only; and not to those who were in for another part of the parish.

Verdict for the plaintiffs.

Pearson, and _____, for the plaintiffs. Taunton, for the defendants.

[Attornies—Fowler and Wright.]

In the following term, Taunton moved for a new trial on these grounds, which was refused by the Court of King's Bench. See 3 Dow. & Ry.

CLARK v. WEBSTER and SALT.

If defendants justify shooting a dog by pleading that he attacked them, and that he "was accustomed to attack and bits mankind;" the plaintiff may call witnesses to prove the general quietness of the dog.

general quietness of the dog.

Samble, that where many useless witnesses are called by the successful party, the Judge will cause the prothonotary to be apprised of it, to guide him in his taxation of costs.

The allegations in a plea in an action for abooting a dog. that he attacked the defendants, and must accustomed to attack and bits mankind, are both material allegations, and must be proved.

This was an action of trespass against the two defendants, for shooting the plaintiff's dog. The defendants pleaded the general issue, and a special plea, which stated "that the dog was accustomed to attack and bite mankind:" that he attacked the two defendants, and "to save themselves from being bitten and wounded, they were of necessity obliged to shoot the dog. They also pleaded another special plea, which stated, that the dog attacked their dogs; and to save their dogs from being killed, they shot the dog.

The evidence was, that the dog was running with the plaintiff's wagon, and went into a field where the defendant Webster was shooting, attended by his father's gamekeeper, the other defendant; when they saw the dog, Webster shot at him, and missed him; he then took Salt's gun, and with that shot the

dog. Evidence was given of the value of the dog.

in anticipation of the defence under the first special plea, the plaintiff called

seven witnesses, to prove that the dog was of quiet habits.

PARK, J., observed, that if in the course of the cause, there did not appear some good reason for calling such a great number of witnesses, in case the plaintiff obtained a verdict, he should cause the Prothonotary to be apprised that only certain witnesses were necessary and material, to guide him in his taxation of costs.

For the defendants, an attempt was made to show that the dog attacked

In this case the action was not only against Mr. Webster, who shot the dog. but also against Salt, who was merely in his company as his gamekeeper, and lent him his gun to shoot the dog. It often happens, that persons in Salt's sinvion are made defendants, because, as such, the real defendant cannot call them as witnesses; and even, if a verdict passes for such added defendant, it is no great loss to the plaintiff, as, in tort, you may recover a verdict against one defendant, hough snother defendant has the verdict in his favor. But this cannot answer as mere vexation, for if there had been no evidence of participation by Salt, the Judge would, in his discretion, have directed the jury, on the application of the defendant's counsel, to find a verdict for Salt, that he might be a witness for Webster. In the case of Ward v. Waterhouse et al. in K. B. Mich. Term. 1820, (MS.) Bayley, J., said, "The rule is, that where there is no evidence against one of several defendants, he is not to be acquitted, till the other defendants have called all their other witnesses; and if there is then no evidence against him, the Judge will direct his acquittal, and the other defendants may examine him." In the principal case, there was clear evidence of participation by Salt.

Intimations to the prothonotary, of the kind mentioned by his Lordship, would effect in many cases a most salutary reformation in the administration of the law of costs. In a vast number of cases, many insignificant witnesses are brought to the place of trial, when the party bringing them felt sure of the verdict, merely to increase the costs to be paid by the other party. In a case, a very short time ago, where the plaintiff brought an action against his next door neighbor, for encroaching on his land, by building overbounds, to the extent of six feet in length, and five inches in breadth: feeling sure of a verdict, he gave very long briefs, employed six counsel, and brought upwards of thirty witnesses to the place of trial. The scheme did not succeed, the jury finding for the defendant. A more flatigious oppression was intended in a case, which occurred in the North. It is said, that a noble Earl brought an action against a celebrated poet, for a trespass; his Lordship not only retained but actually gave a brief to every barrister, on the Northern Circuit, in number, upwards of sixty: the intention probably was, to put the defendant to the expense of three hundred guineas, for a special retainer: however, the defendant pleaded his own cause. This trick is not new; for, in Rhymer's Federa, there is a petition of Robert Pickerell, exhibited to the King in parliament, in the second year of Rickard the second; in which he complains, that Alice Perrers, (a concubine of Robert Pickerell, exhibited to the King in parliament, in the second year of Rickard the second; in which he complains, that Alice Perrers, (a concubine of Robert Pickerell, exhibited to the King in parliament, in the second have no advice: "si il ne demacroit si grande summe d'or qu'il ne poil altainder."

them; and it was proved, that the dog sometimes stood in the plaintiff's yard, and growled and barked at people, who passed along the adjacent road; but no evidence was given that he had bitten any one. Evidence was given that he had been muzzled at one time, though he was not so at the time he was shot. Evidence was also given, that he had pushed down a man, who carried a pack, by rearing against him.

PARK, J., held, that this evidence did not support the *first special plea, (the only one relied on.) because there was no evidence of the material allegation, "that the dog was accustomed to attack and bite mankind." His Lordship, therefore, directed a verdict for the plaintiff, which was given.

Damages, 51.

Jervis, and Campbell, for the plaintiff. Pearson, for the defendant.

[Attornies—Flint and Johnson.]

BEFORE MR. BARON HULLOCK.

ALSOP v. SILVESTER.

Agent selling goods, and disclosing the name of the vendes, is not liable for the price to his principal, unless acting under a del creders commission.

This was an action for goods sold and delivered; in which the general

issue was pleaded.

HULLOCK, B., laid down, that if a person authorises an agent to sell goods, who does so, disclosing to his principal the name of the purchaser, the principal can maintain no action against the agent, for the price of the goods; unless the agent acts under a del credere commission.

Campbell, and Caldwell, for the plaintiff Russel, and Male, for the defendant.

[Attornies—Astbury and Fisher.]

† An agent acting under a del credere commission, undertakes to pay his principal for the goods he sells as agent, whether the vendees pay him or not: so that in fact, he insures the solvency of the vendees to his principal. For this, of course, he has a large per centage.

*BEFORE MR. JUSTICE PARK.

HALLEN v. HOMER.

A trader's absenting himself from ANY place, with intent to delay a creditor, is an act of bankruptcy; and it is immaterial whether a creditor be actually delayed or not. In all cases where the validity of a commission of bankrupt is tried, every creditor of the estate is incompetent as a witness.

This was an action of trover.

The plaintiff had become bankrupt, and the defendant was the sole assignee under the commission. The action was brought to try the validity of the commission. Notice had been given, to dispute the act of bankruptcy, under the statute, 49 Geo. 3, c. 121.

The defendant's counsel admitted the detaining of the goods, and produced, as evidence, the commission, the provisional assignment, and the assignment to the defendant. The trading and petitioning creditor's debt were proved by the production of the proceedings under the commission.†

To prove the act of bankruptcy, a creditor was called: he was objected to by Mr. Jervis. Mr. Taunton contended, that the witness was admissible, because this was a mere action of trover for goods, and not an action or an issue directed by the Chancellor to try the validity of the commission.

*PARK, J., held, that the witness was clearly imcompetent. This was plainly an action to try the validity of the commission; in such an action every creditor was interested. The witness was therefore rejected.

Another witness was called, who proved that the plaintiff did not go as usual to his counting-house, and that the plaintiff had made declarations indicative of his bad circumstances.

Other witnesses were called to prove, that he kept out of the way, and avoided payment of a baker's bill, of 11. 15s. for which sum the baker often called, but could neither see the plaintiff, nor get his money.

PARK, J., held, that if a trader absented himself from any place, with intent to delay a creditor, though that place was not his house, it was still an act of bankruptcy; and whether in fact a creditor was delayed or not, made no difference, if the evidence satisfied the jury that he absented himself with that mtent. The baker's bill being so small an amount, was much stronger evi-

† By the statute 49 Geo. 3, c. 121, § 10, it is enacted that in all actions, by or against stagnees, the commission and proceedings under it shall be sufficient evidence of the satisfactor's debt, the trading, and the act of bankruptcy, unless notice in wrireturbing creations dead, the training, and the act of bankruptcy, unless notice in writing be given to the assignees by the other party, (if defendant, at or before pleat if plaintiff, before issue joined.) of his intention of disputing such matters, or any of them. \$ 11 makes nearly similar provisions for suits in equity, by or against assignees. In proving the proceedings, you ought to produce the commission, and cause the proceedings under it to be produced by the solicitor to the commission, or be prepared with proof of the hand-writing of one of the commissioners, if they are produced by any one else; the

and any other deeds.

In actions to dispute the validity of a commission of bankruptcy, where it is necessary to call a creditor as a witness in support of the commission, the common practice is, way to call a creditor as a witness in support or the commission, the common practice is, to make him competent by paying him the amount of his debt, which is somtimes done in court, at the trial. In this way the servants of bankrupts often get paid their wages.

§ In another case, a proprietor of a theatre, getting behind a scene, to avoid a bailiff, has been held to have committed an act of bankruptcy, as have persons who have either absented themselves from the Royal Exchange, or broken an appointment, it being presed they had done so to avoid a crediter: the words of the statute 1 Jac. 1, c. 15, being, shall begin to keep house "or etherwise absent him or herself."

dence that the plaintiff was insolvent, than evading the payment of a larger sum. Many a solvent trader might not be always ready to pay a bill of 5004, but if he could not pay 11. 15s. it was presumptive evidence of his insolvency.

Verdict for the defendant.

Jervis, and —, for the plaintiff. Taunton, for the defendant.

[Attornies—Richards and Patterson.]

*SHREWSBURY ASSIZES.

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(Nisi Prius.)

BEFORE MR. BARON HULLOCK.

GRIFFITHS v. LEE, et als.

In action against carriers for loss of a parcel, the consignee's shopman not knowing of the delivery, and believing that he must have known it, if a delivery had taken place, is prima facie evidence of non-delivery.

This was an action of assumpsit, for negligence against carriers in losing a parcel, in which the general issue was pleaded.

The plaintiff, a linen draper at *Holywell*, in *Flintshire*, had ordered goods from *Shrewsbury* to be sent by the defendants' stage coach. The consignor of the goods proved the giving the parcel to the defendants' coachman, and that it was directed to the plaintiff, and was worth 15l. To show that it never came to hand, the plaintiff's shopman was called, who did not know of the delivery, but believed it could not have been delivered without his knowledge.

Actions against carriers must usually be brought by the consignee, as he, on the delivery of the goods to the carrier, has the property of them, subject, however, to the right of stoppage in transits. In Dawes v. Peck, 8 Ter. Rep. 330, a consignee had ordered goods to be sent by a particular currier, who lost them. The consignor brought the action. The Court held, that he could not maintain it for the reason above stated. And in Datton v Solomonson, 3 Bos. & Pul. at page 584. Lord Alvanley, in giving the judgment of the Court of Common Pleas, says: "It appeared to me, to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser. The whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods, it is at his risk; the only exception to the purchaser's right over the goods, is, that the vendor, in case of the former becoming insolvent, may stop them in transits." The old way of declaring against a carrier was, to declare on the custom of the realm. The modern practice is, to declare in assumpti, in which you can add the common counts. However, you cannot add a count in trover; and, if you declare in contract against too few, it may be pleaded in abatement; and if against too many, the plaintiff is monsuited. If, on the contrary, you declare for a tort, you may join a count in trover, and gain a verdict against such of the defendants as you can prove your case against. I should, however, observe, that, by the case of Ross v. Johnson, 5 Burr. Rep. 2825, a

The defence set up was, the usual carriers' 5*l*. notice. The shopman of the plaintiff was cross-examined, to show that the plaintiff read the notice in the *Chester Chronicle*; but he did not know whether the plaintiff read that paper or not. The consignor admitted, that he read that paper, but never observed the notice.

HULLOCK, B., considered, that the evidence of non-delivery was sufficient to call on the defendants to prove a delivery by their porter, or some other witness; because the plaintiff could not be expected to prove a non-delivery better than he has done. As to the proof of notice, that had failed altogether.

Verdict for the plaintiff, damages 15%.

Tranton, and —, for the plaintiff. Puller, and Russel, for the defendant.

[Attornies-Lee and Brown.].

mere unavoidable loss of goods by a carrier will not support the count in trover; the loss being such an excuse as to make the non-delivery not amount to a tortious conversion. It will be proper to take care to avoid the mistake, of intending to declare in tort, and really declaring in contract; for which see-the cases of Goset v. Radnigs and others, 3 Ea Rep. 62; Powell v. Layton, 3 Bos. & Pul. 365; Max v. Roberts, 2 New. Rep. 454; and S. C. 12 Ea. Rep. 89; and Weale v. King and others, 12 Ea. Rep. 452.

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*TAPPIN v. BROSTER.

In an action for money paid, laid out and expended, the plaintiff must prove some authority from the defendant to pay the money.

This was an action for money laid out and expended; in which the general issue was pleaded.

The plaintiff was guard of the London and Holyhead mail. The defendant resided at Holyhead, and frequently received parcels by that mail. At Shreus-bury, all the parcels are taken out of the mail, and the guard pays the proprietors the carriage of such parcels as he delivers on the journey afterwards: among them were the parcels in question.

The amount paid by the guard was 2l. 15s., which amount, it was alleged, the defendant had never repaid him, though the parcels had been duly delivered.

To support this case, the porter in Shrewsbury proved the replacing the parcels in the coach to go to Holyhead; and the clerk who produced the way-bills, proved the payment of the money to himself by the plaintiff. He also proved, as did the clerk at Holyhead, that the defendant had never complained of the non-delivery of any of the parcels. Another witness proved, that, when he took the account to the defendant, he said, he did not owe the guard any such money; he only owed him 15s.

HULLOCE, B., observed, this was not an action for the carriage of parcels, but for money paid, laid out, and expended by the guard, to the defendant's use. He was clearly of opinion, that the action could not be supported for the whole amount; because there was no evidence that the defendant had either authorised or directed the guard to lay out the money on his account; and he conceived that no action for money paid could ever be maintained, unless there was evidence that the money was paid, not only for the

defendant's benefit, but by his authority. As to the 15s., as the defendant admitted it to be due, a verdict must be found for the plaintiff for that sum.

Verdict for the plaintiff; damages, 152.

Tounion, and ----, for the plaintiff. Campbell, for the defendant.

[Attornies-Williams and Dax.]

The Warden and Combrethren of the Crasts of Mercers, Ironmongers, and Goldsmiths, of the Town of Shrewsbury, v. HART.

By custom, a company may compel all of their trade to become members.

A company by prescription may have more than one corporate name.

The chest of a company, kept by the clerk of the company, is proper custody for old documents relating to the company.

But the private house of a deceased clerk of the company is not proper custody for a convention temp.

Edw. 4. between the Prisce of Wales and the company.

This was an action on the case, brought by the company against the defendant, for carrying on the trade of a Mercer, in the town of Shrewsbury, without being free of this company. There were different counts to vary the name of the company. The general issue was pleaded.

The plaintiffs' counsel opened for nominal damages, the action being brought

to try the right.

That the defendant had carried on the trade, and was not a freeman, was admitted.

To prove that the company were, and always had been a company, a series of books, containing admissions of freemen, and other acts of the company, were put in. They commenced in the reign of Henry the Sixth, and came down to the present time,

These books were produced from a chest, which had always been in the custody of the clerk of the company for the time being: this

HULLOCK, B., considered good custody.

A convention between the Prince of Wales and the company, (calling them a company,) dated in the reign of Edward the Fourth, was offered in evidence; but this was not taken from the chest, but found in the house of 2 former clerk of the company after his death. HULLOCK, B., rejected this evidence, as not coming from proper custody.†

As in ancient documents, the hand-writing never can be proved, to make them admissible evidence, they must be shown to come from the custody of the person who might be expected to have possession of them. if genuine. Documents from the British Museum, the Bodleian Library, and the collection of Mr. Astle, have been rejected; because it could not be shown that those repositories were connected with the subject matter. In the case before us, the convention between the Prince of Wales and the Museum Comment of improvement was the Mercer's Company, which was evidently in its day a document of importance, was rejected, because it did not come from proper custody; while, in the case of Bullen v. Michel, 2 Price Rep. and 4 Dow Rep., a book, called a chartulary, (but which appears to have been merely a sort of memorandum-book.) which had belonged to Glastonbury Abbey, was admitted as evidence, to prove the endowment of a vicarage, of which that Abbey were impropriators; because it was found in the possession of the Marquis of Bath, who succeeded to a large portion of the lands of this abbey. This book was admitted as evidence, though it contained, besides the entry used, a calender of saints, a history of the giants who inhabited England before the Druids, a pedigree of the Kings of England up to Adam, and a variety of other trash. Where ancient documents are expected against you, it is advisable to be prepared with some one conversant with the old hands, to

*Evidence was also given to show that the beadle of the company always attended at the assizes to guard the judges, and that the company had regular officers, regular meetings, entered their acts in a book, and had feasts.

To prove that mercers at Shrewsbury must belong to the company, a series of entries, beginning in the reign of Henry the Sixth, and continued to the present time, were produced (in the book first mentioned,) to show the admission of a great number of mercers to be freemen; and several very old mercers, (who had been disfranchised, to make them competent witnesses,) were called, to prove that, till the defendant and a few others resisted, all the mercers in Shrewsbury had been free of the company.

Two petitions to the company, from mercers, were produced from the chest, both dated in the reign of Charles the Second; each petition stated, that the petitioner had carried on the trade of a mercer in Shrewsbury, without being free of the company; that the company had threatened to commence legal proceedings against the petitioner, who expressed his contrition, and asked to be admitted to his freedom; which the admission-book showed had afterwards been done in both cases.

In the evidence, it appeared that the company had not always been called by the same name; sometimes, the Company of Mercers; sometimes, the Mercer's Guild; sometimes, as at the head of the case; and other similar names.†

No evidence was given on the part of the defendant.

*HULLOCK, B., left it to the jury to say, whether the plaintiffs were a company; and whether they were satisfied, that, by custom, all mercers in Shrewsbury must belong to it.

Verdict for the Company on both points.

Campbell and Corbet, for the plaintiffs. Jervis and Taunton, for the defendant.

[Attornies—Edgerby and Thomas.]

examine them as they are produced. I know, from considerable experience in reading ancient writings, that the date of a document may be fixed pretty accurately by the style of hand-writing. This is material, not only to detect forgeries, but copies produced as originals. Thus, if a deed, bearing date of *Edward* the Third's reign is produced, and it originals. It has, it a deed, bearing date of Edward the I hird's reign is produced, and it is written in hand not used till Queen Elizabeth's reign, it must be either a forgery or a copy, and cannot be a genuine original. Forgeries have also been detected by being written on stamps not in use till after the date. I should also recommend, if the document is on paper, to look at the water-mark. A paper was once put into my hand, as an agreement of the reign of Charles the Second: I suspected it, because the hand-writing did not appear to be of that date, I looked for the water-mark, and found it to be G. R.,

† In an Anon. case, in 3 Salk. Rep. 102, pl. 2, it is laid down by Treby, C. J., and Powell, J., that "a corporation, if by prescription, may have several names; but if by charter, it is otherwise."

(Crown Side.)

BEFORE MR. JUSTICE PARK.

REX v. HENRY KNIGHT, and ANNE, his wife.

If larceny be jointly committed by husband and wife, the wife is entitled to be acquitted, as under coercion; the woman being indicted as "the wife of A. B." is sufficient proof that she is so, for this purpose.

THESE prisoners were indicted for stealing curtain pins. From the evidence, it appeared, that both the prisoners were in company, at the time of the theft. PARE, J., directed the jury to acquit the female prisoner, because, if a man and his wife jointly commit a felony, the wife, being presumed in law under his coercion and control, is entitled to an acquittal.† It was not necessary in this case to adduce evidence to show she was his wife, as it was admitted on the face of the indictment; the prisoners being indicted as "Henry Knight and Anne, his wife.";

t In all cases, except treason and murder, where a felony is committed by a husband and wife jointly, or by a wife in company with her husband, the wife, being presumed in law under his control, is entitled to an acquittal. A strong case on this subject occurred on the Midland Circsit, before Mr. Justice Burrough: A husband and wife were jointly indicted for a robbery; it appeared that the husband was reluctant, but his wife compelled him to go with her and commit the robbery: the learned Judge directed the Jury to acquit the woman, on the ground of coercion; saying, that it was a presumption of law, which he and they were bound by; however, in fact, the coercion might be the contrary way. The woman was acquitted, and the man found guilty. Another strong case is that of Elizabeth Ryens, better known by the name of Paddy Brown's wife, who was tried at the old Bailey, a few years ago, under the statute of 16 Geo. 2, c. 31, for conveying implements of escape to her husband, who was in Newgate, convicted of felony. It appeared, that she procured the instruments in question, by her husband's direction. She was convicted, but afterwards pardoned: it was understood, because the Judges considered that she acted under coercion, though her husband, from being in prison, could not be present. In an indictment for keeping a brothel, husband and wife may be both punished.

In cases where a woman is not so indicted, evidence of cohabitation, and reputation of being his wife, would be sufficient, unless rebutted: cases having decided that such

In cases where a woman is not so indicted, evidence of cohabitation, and reputation of being his wife, would be sufficient, unless rebutted: cases having decided that such evidence, not rebutted, is proof enough of marriage, in all cases except bigamy and criscos. Perhaps, before leaving this subject, it ought to be mentioned that Lord Hale, (I H. P. C. 516.) says: "I take this (coercion) to be only a presumption, till the contrary appear; for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by the husband, but that she was the principal actor and incitor of it, she is guilty as well as the husband; but stabitur presumptic dense probetur in constrarium." Though this appears to have been the opinion of Lord Hale, the modern practice is, on finding by the evidence that the offence was joint, for the Court to direct the acquittal of the wife, without at all considering or inquiring, how far she was, or was not, the principal actor or inciter of the offence. Indeed, if Lord Hale's rule was acted apon, a wife could herdly ever be acquitted, unless she was under actual compulsion.

*BEFORE MR. JUSTICE PARK.

SANFORD v. HUNT.

Is debt on bond, the only plea being solvit ad diem; the execution of the bond is admitted, and the defendant begins.

This was an action of a debt on a bond; in which solvit ad diem was

pleaded, without the general issue, or any other plea.

PARK, J., intimated, that the plea of solvit ad diem alone admits the bond and execution of it, and that the defendant begins; the affirmative of the issue, payment or no payment, being on him.†

The evidence not supporting the plea, there was a

Verdict for the plaintiff.

† In almost all cases, where the affirmative of the issue lies on the defendant, he begins; but this in practice is not very common, as almost always, with an affirmative plea, the defendant pleads the general issue, which calls on the plaintiff for some proofs.

BROWN, Esq. v. GILES.

In civil cases, the Judge will allow the plaintiff's counsel, after he has closed his case, to recall a wituess to prove a point omitted to be proved in the proper place.

A dog jumping into a field, without the consent of its master, is not a trespass, for which an action will lie.

This was an action against the defendant, for breaking the plaintiff's close with dogs, &c., and trampling down his grass in a certain close, called *Bryant's* close, in the parish of A., on divers days. The defendant pleaded the general issue.

The usual notice not to trespass was proved; and a witness proved, that, after the notice, he saw the desendant walking down the turnpike road, and his dog jumped into the field, called Bryant's close.

*PARE, J., was decidedly of opinion, that the dog jumping into the field, without the consent of its master, not only was not a wilful trespass, but was no trespass at all, on which an action could be maintained; he should therefore nonsuit the plaintiff.†

† No action lies for damage done by a person's dog, without the person's concurrence, or a knowledge of bad propensities in the dog, even where there is considerable actual damage, as sheep biting, &c. In general, no action lies for an involuntary trespass. The eldest case on the subject is in the year-book of 37 Hen. 6, 37, pl. 26, which decides, that i. a man is assaulted, and when in danger runs through the close of another, not keeping the footpath, no action lies; it being necessary for his preservation. It is laid down in 2 Roll. Ab. 566, pl. 1, that if cattle, in passage on the highway, eat herbs or corn raptim et sparsim, against the will of the owner, it will excuse the trespass. In Millen v. Fawdry, Poph. 161, the defendants dog chased the plaintiff's sheep; defendant called him off: held, that no action lay. In Beckwith, Esq. v. Shardike and Hatch, 4 Burr. Rep. 2092, the Court lay down, that, if a person goes along a footpath, and his dog happens to escape from him and run into a paddock and pull down a deer against his will, it is no trespass.

A person was then called who stated that the defendant admitted, that he had gone at another time, since the notice, into Bryant's close, but that he claimed a right of way there. No plea of right of way was put on the record.

This was the case for the plaintiff.

Pearson objected, that there was no evidence, that the close was in the possession of the plaintiff.

Campbell said, he had only omitted to prove it, from supposing it could not be disputed; he, therefore, hoped the learned Judge would allow him to call a witness to prove it.

Pearson strongly objected to this, and stated, that some years since he had defended a man at Stafford, for *burglary; whom two King's counsel were brought from the other Court to prosecute. When they had closed their case, he objected, that there was no evidence that the house had been shut up the night before. The prosecutor's counsel said, they had forgotten to prove it, and wished to recall a witness, as Mr. Campbell did, but the learned Judge would not allow it; and the prisoner was therefore acquitted.

PARK, J., after some hesitation, allowed a witness to be recalled, observing

that this was not a criminal case like that cited by Mr. Pearson.†

A witness being recalled, proved the close to be in the occupation of the plaintiff, and that it was in the parish and county, laid in the declaration.

Verdict for the plaintiff; damages, One farthing.

The learned Judge refused to certify. *Campbell, and Ryan, for the plaintiff.

Pearson, for the defendant.

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[Attornies—Hardwick, and Collins.]

† A plaintiff has been allowed in a penal action, under a statute, to supply proof which his counsel had omitted to bring forward before closing his case. The case of ——, Clk. v. Sir Montague Burgoyne, Bart., tried at Chelmsford, was an action of debt, for 30l. per month, for not going to church, under the statute of 23 Elis. c. 1. There the plaintiff's counsel forgot to prove that Sir Montague lived in the parish; but was permitted to recall a witness to prove this, after he had closed his case. Sir Montague then entered on his defence, which was under the 12th section of that statute, which makes it an excuse that divine service should be performed in the defendant's house; on which a verdict was given in his favor. It may at first sight appear strange, that the defendant, in the principal case, did not put the plea of right of way on the record: but he was properly advised to omit it; because you should never justify a frivolous trespass, unless you are sure of success; since, if the justification is found against you, with only nominal damages it carries full casts. The same rule applies where a battery is justified, and the plea fails: but if the assessed only is justified, and that justification fails, it does not of necessity carry full costs.

LYSTER, Esq., v. BROWN et al.

In action of debt, on the 11 Geo. 2, c. 19, against a tenant for fraudulently removing his goods, to avoid a distress; it is immaterial whether the removal is in the night or not; or with concealment or not. Evidence that the tenant's sons removed the goods with his consent, will support a declaration against him for removing the goods, and them for assisting him in such removal.

This was an action of debt, on the third section of the statue 11 Geo. 2, c. 19, against the defendant, George Brown, for double value of goods fraudulently removed from a farm, of which he was tenant to the plaintiff, to prevent a distress for rent, and against the other defendants, his sons, for aiding and assisting him. Plea—the general issue.

To support the action, the plaintiff's steward proved that George Brown was tenant of the farm, of which the plaintiff was landlord; and that he was upwards of 500l. in arrear of rent; that he had often threatened Brown with a distress.

Evidence was given to show, that great quantities of farming stock were removed; some to a farm of one of the sons, some to other places; and circumstances and declarations of all the defendants, to convince the Jury of the fraudulent intent. Evidence was also given of the small and insufficient value of the goods left on the premises, and of the value of the goods taken away.

From the cross-examination, it appeared that the goods were not removed in

the night, or with any particular concealment.

PARK, J., intimated, that the removal in the night, or with concealment, were not necessary to support the *action; and, therefore, this was only evidence to rebut the evidence of fraudulent intent.

It appeared that the removal was effected by the sons, without any active participation by the father, who only appeared to be privy and consenting to

the removal.

Taunton objected, that that put an end to the action; because the statute only gave the penalty in cases where the removal was by the tenant, assisted

by others; here, on the evidence, it was just the reverse.

PARK, J., thought, that, if the sons removed the goods, with the father's consent, all were equally principals; or a tenant, who was afflicted with the gout, might have his goods fraudulently removed with impunity. His Lordship then left it to the jury to say, whether they thought the removal fraudulent; and, if so, they would say whether the removal was by the sons alone, with the privity and consent of the father.

The jury found for the plaintiff, stating the removal to be by the sons only,

with the father's privity and consent.

The learned Judge gave Mr. Taunton leave to enter a nonsuit, in case the Court above should be with him on his objection.

*Campbell, and —, for the plaintiff.

[Attornies-Lloyd and Wheeler.] .

In the following *Michaelmas* Term. *Pearson* moved to enter a nonsuit on the point reserved by Mr. Justice Park; but the Court of King's Bench, concurring with the opinion of Mr. Justice Park, refused the rule.

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[†] The words of the 3d section of the statute 11 Geo. 2, c. 19, are: "To deter tenants from fraudulently conveying away their goods and chattels, and others from wilfully aiding or assisting therein." It is enacted, "that if any such tenant or lessee shall fraudulently remove, and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee, in such fraudulent conveying away, or carrying off any part of his or her goods or chattels, or in concealing the same, all and every person and persons so offending, shall forfeit and psy, &c."

BEFORE MR. BARON HULLOCK.

DOE, on the joint and several Demises of the Minister, Churchwardens, and Overseers of the Poor of the Parish of St. Julian, Shrewsbury, v. COWLEY.

Spectment cannot be brought against a person for setting up a stall in a street. The remedy is an action of trespass by the owner of the soil.

This was an ejectment to recover a certain quantity of land, situate in Fish-Street, Shrewsbury, in the parish of St. Julian. The land in question was

really the seil of part of the street itself.

The facts were these:—The defendant had for some years erected stalls in Fish-Street, on market, days, and he had used the church-yard wall as the back of his stalls: for this use of their wall he had paid the parish of St. Julian 51. a-year. The lessors of the plaintiff had given him notice to quit, and he ceased to use the wall, and built his stalls in the street, with wooden backs, three inches from the wall. The present ejectment was brought, the parish alleging that the soil of the street was their freehold, as far *as the middle, in like manner as the soil of a river to the filum aque.

HULLOCK, B., had never heard before of an ejectment for a street, and was decidedly of opinion that it would not lie, if the soil of the street did belong to the parish, and there would be some difficulty in proving that. The proper way would be for them to bring an action of trespass for disturbing their soil, as is done in cases of disturbance of mines, where a public road runs over the

surface of the land.

, Plaintiffs nonsuited.

† The case of the Mayor, &c., of Northampton v. Ward. 2 Str. Rep. 1238, and 1 Wils. Rep. 107. was an action of trespass quare clausum fregit, for breaking the plaintiff's close, called Butcher Row, and erecting a stall there. The defendant pleaded, that it was a market, and that he entered and put up a stall there to sell his meat: Replication, that the plaintiffs were seised in fee of the soil and market; and that the defendant, without leave, and of his own wrong, entered and set up a stall. To this there was a demurrer. The case was argued three times before the Court of King's Bench; and it was contended, that the defendant had a right to put up a stall in the market, and that trespass was not the proper action. Per Curiam—No person has a right to set up a stall in a market, without paying a compensation to the owner of the soil; and if one does wrongfully place a stall there, an action of trespass is the proper remedy for the owner of the soil. He sannot bring debt or assumpeit, as there is no certain duty or implied contract. The case of the Mayor, &c., of Norwick v. Swan, 2 Bl. Rep. 1116, is precisely similar, except that there the defendant placed a table to sell his goods upon, instead of erecting a stall.

REX v. EDMOND WHITCOMB, Gent., one of the Coroners of Shropshire.

Information against a coroner for corruption in his office, who was found guilty. • The judge refused to commit the defendant, or to hold him to bail, no disposition to abscond being shown.

This was a criminal information, which charged, that the defendant, being one of the coroners of the county of *Salop, as such coroner held an inquest on one Sarah Newton, who was murdered by John Newton.

her husband; of which murder John Newton was convicted; and that the defendant corruptly, and for lucre and gain, secretly examined several of the witnesses, before the swearing of the jury; that he, knowing Newton to be suspected of the murder, corruptly agreed with him to persuade the jury, that he was not the cause of his wife's death; that he corruptly dismissed twelve of the twenty-four jurors summoned; that he corruptly omitted to examine a witness, whose evidence he was apprised of; and prevented the jury from viewing the body. The other counts, fourteen in number, charged each of these corrupt acts separately, and in different ways. Plea-Not guilty.

Witnesses were called to prove the facts charged, and circumstances to induce the jury to infer corruption. An examined copy of the record of conviction of John Newton, for murder, was put in ;† and the original record of the inquisition on the body of Surah Newton, under the hands and seals of the defend-

ant, as coroner, and of the jurors.

For the defence, witnesses were called to disprove the circumstances charged, and the corruption; one of whom was cross-examined as to an affidevit he had made contradictory of his present statement. The affidavit was read: it was an affidavit made by the witness in the Court of King's Bench, and used in the showing cause against the rule nisi for the present information.

"The defendant's counsel also put in the original depositions taken

before the defendant at the inquest.

Hullock, B., left the evidence of the facts, and the corrupt motive to the jury. Verdict-Guilty.

Pearson asked that the defendant should give bail for his appearance to recive indement.

HULLOCK, B., stated, that where no disposition to abscond was manifested, the application was quite unusual, and declined making any such order.

Pearson then asked for the defendant's own recognizances, which the learned

Baron also declined ordering.

Pearson, Campbell, Russel, and Ryan, for the prosecution. Peake, Serit., Jervia, Puller, and Corbet, for the defendant.

[Amornics-Loxdale and Collins.]

† You get this by applying at the office of the clerk of assize of the circuit, for an office copy of the record you want, and letting a witness, who will attend the trial, examine such copy with the original record.

1 This record was produced by the clerk of assize.

1 The way to get the original of any affidavit from the crown office, for the purpose of producing it in evidence on a trial, is to cause an office copy of it to be taken; the attorney in the cause in which it is to be produced, (or other proper parson,) then gives an under-taking to return the original affidavit as soon as used. He is (on one of the clerks in court chaining a judge's order for that purpose, which order is granted on a statement of the first, permitted, to take it away, leaving the office copy and the undertaking in its place. il it is returned.

I In some of the cases of biasphemens libel, I have known the neutronam community of the bail for his appearance to receive judgment, though no particular disposition seems has been manufacted.

HEREFORD ASSIZES.

(Crown Side.)

BEFORE MR. BARON HULLOCK.

REX v. THOMAS HALLOWAY.

Variance.—An indictment for stealing "a brase furnace" in the county of H. is not supported by evidence of stealing a brase furnace in the county of E. and breaking it there, and bringing the pieces into H. shire.

THE indictment in this case charged the prisoner with stealing one brass

furnace, at the Parish of Brilley, in the county of Hereford.

From the evidence, it appeared, that the prisoner had stolen the furnace at a place called Clowes, in the county of Radnor, and that he carried it a little way, and then broke it, bringing the fragments into the county of Hereford. It appeared that Clowes, and the place at which he broke the furnace, were both

at more than five hundred yards from the boundary of the county of Hereford. HULLOCK, B., directed an acquittal, and said: Though a prisoner may be indicted for a larceny in any county, into which he takes stolen property, the present indictment must fail, as he never had the "brass furnace" in Herefordshire, or within five hundred yards of its boundaries: he merely had there certain pieces of brass.

Verdict-Not Guilty.

† By the statute 59 Geo. 3, c. 96, \$ 2, it is enacted, that in any indictment for felony committed on the boundary of two or more counties, or within five hundred yards of the

committed on the boundary of two or more counties, or within five hundred yards of the boundary, it shall be sufficient to lay the offence in either.

† With regard to description of stolen property in an indictment, it is particularly necessary to be precise. Nothing is so common as for the clearest cases to fail from a mis-description of this kind. I need not mention the well known case of a man, indicted for stealing a pair of stockings, being acquitted, because the stockings were proved to be odd ones; or of the person acquitted of a tealing a duck, because in proof it turned out to be a drake. I was present at the acquittal of a man for forgery, in altering a levari facias from the county court, because it was called in the indictment a writ; a levari facias from the county court not being a writ, but only a warrant from the sheriff to his officer. It is best, at least in one count, to call the thing stolen by the same name the witnesses will call it in their evidence. When an animal is described in an indictment by its name only, without the epithet dead, it will be considered to be alive. An indictment for stealing a horse would be but ill supported by proof of stealing a dead horse. The nearest case that I recollect to have met with is Rough's case, in Mr. East's Pleas of the Crown, where the prisoner was indicted for stealing a pheasant of the value of forty shillings, of the goods and chattels of the prosecutor: the twelve Judges held, that, from the description, it must be taken to be a pheasant alive, and so fere natura; and, to show it to be a felony, the indictment should state it to have been dead or reclaimed; and the stating it to be of the goods and chattels, did not supply the deficiency. Perhaps the most curious distinction the indictment should state it to have been dead or reclaimed; and the stating it to be of the goods and chattels, did not supply the deficiency. Perhaps the most curious distinction between living and dead is, that the stealing the skin of a dog, like stealing any other skin from the furrier, is a larceny; whereas stealing the living dog, which is the skin and something more, is no larceny; dogs being considered in law of a base nature, and not subject to larceny. In actions against lords of manors for taking away game, the declaration usually is, that the defendant, "with force and arms, seized, took, and carried away" so many "dead hares," &c. Bird v. Dale, 7 Taunt. Rep. 560, and Churchward v. Studdy, 14 Ea. Rep. 249, are instances of this. It may be said, that, in actions for penalties, for having game in possession, it is not usual to state that the defendant had a dead here in his possession, but merely a hare. I apprehend the reason is, that this being an action on a statute, it is considered sufficient to follow the words of it.

*SAME v. SAME.

Variance.—An indictment for stealing two turbes, not supported by proof of stealing two dead turkies.

The same prisoner was also indicted for stealing "two turkies." [See Note (†) to the preceding case.]

*In evidence the turkies appeared to have been dead turkies, stolen from a larder.

HULLIGE, B., ruled, that this indictment could not be supported; for "two turkies" must be taken to mean live turkies. It ought to have been for stealing two dead turkies.

Verdict-Not Guilty.

REX v. GEORGE TYLER and JOHN FINCH.

Confession of a prisoner to a constable, who had held out no inducement, is evidence; though an inducement had been previously held out by a person in no office or authority.

THESE prisoners were indicted for breaking into a house in the day-time, no person being therein.

Curwood offered to prove a confession of the prisoner Finch, made to a constable.

Sir W. Owen, for the prisoners, wished to show that the prisoner Finch, being locked up alone in a room at a public-house, was told by a man, that the other prisoner had told all, and he had better do the same to save his neck: and that on this the prisoner Finch confessed.

HULLOCK. B., held, that as the promise, (if any.) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, *must be considered as voluntary, and was therefore evidence.

Verdict-Guilty.

Curwood, for the prosecution. Sir W. Owen, for the prisoner.

When the supposed confession was proved, it apppeared that the prisoner said, that a man had told him, he had better tell all, for the other prisoner had confessed; but that he would not say a word. for he came too far north. Here we see a man's refusal to confess, nearly as strong evidence against him, as if he had actually confessed. See the case of Rex v. Elizabeth Gibbons, supra, and the notes to that case.

(Civil Side.)

BEFORE MR. JUSTICE PARK.

DOE, on the Demise of DAVIS v. DAVIS.

A second son, who was living with his father at the time of his death, holding possession of his father's house, levies a fine with proclamations. The eldest son need not make an actual entry to avoid this fine.

The plaintiff was the eldest, and the defendant the second son of a Mr. Davis, who was seized in fee of the house for which the present ejectment was brought. It appeared that the defendant had lived with his father for some time previous to his death, at the house in question, and continued to reside in the house after the father's death, when he levied a fine with proclamations, which was proved; and the defendant's counsel contended, that he must succeed, as there had been no actual entry by the lessor of the plaintiff; but—

PARK, J., considered such entry unnecessary, as the second son merely continued in the house he had rightfully resided in during his father's lifetime; and that he was not seized of the freehold rightfully, or by disseizin. His Lordship therefore directed a

Verdict for the plaintiff.

*A rule sist for a new trial having been obtained, and the case argued in the Court of Exchequer-

Graham, B., now delivered the opinion of the Court.—In this case a second son is left in possession at the death of his father, and levies a fine. The question is, whether he has a freehold by disseizin. A person, to levy a fine, must either have a freehold by right or by wrong. And if by wrong the cases show, that the possession must be adverse. There must be a wrong in the original entry. Now here the defendant was permitted to enter by his father, which is clearly not a tortious entry; and in Doe v. Perkins, Lord Ellenborough and the rest of the Court held, that if a man held over on a lease, and a descent was east, the entry was not tolled; because the possession of the defendant's ancestor did not originate tortiously. We are therefore of opinion, that the present defendant's possession was not a disseizin of the freehold.†

† In the case of Doe v. Perkins, 3 M. & S., a lessee for years of a tenant for life, who had died, levied a fine. Lord Ellenborough, in giving judgment, says, that in order to constitute a disseizin, there must be a wrongful entry. A wrongful continuance in possession is not a disseizin; and a fine by such a person will not require an entry to avoid it; and a descent cast will not toll the entry: and in Williams v. Thomas. 12 East, 255, Lord Ellenborough lays down, that a devizee of a tenant for life, entering and receiving the rents, is not a disseizor; for such a person might not do it adversely, nor even know of the claim of the lessor of the plaintiff. Powever, in the case of Lee Compete v. Hicks, 7 T. R. 727, it is laid down, that after a fine levied by a tenant for life, there must be an entry before ejectment brought.

*WATLING v. WALTERS.

A deputy overseer, or even a mere stranger, directing a surgeon to attend a poor man, is liable to pay the surgeon.

Whether an overseer is liable to pay a surgeon who attends a pauper without a retainer quare? A deputy overseer is not.

This was an action by a surgeon for work and labor in attending a third person. Plea—General issue.

In evidence, it appeared, that a pauper, in the parish of which the defendant was deputy overseer of the poor, (not an assistant overseer under 39 Geo. 3, cap. 12.) met with a serious accident; it was proved that the plaintiff attended him, and that the charges were fair.

PARK, J., said, that, without deciding whether or not an action could be maintained against the overseer of a parish by a surgeon, for attending a pauper, he was of opinion that the defendant being a mere deputy overseer, this action could not be maintained against him, without some evidence of a retainer.†

*133] *Evidence was then given, that the defendant had sent a person to the plaintiff to say, that if he would attend the pauper, he (the defendant) would pay him.

The defence attempted was, that the order was given not by the defendant

but by a Mr. Insol; this wholly failed.

PARK. J.. was clearly of opinion, that if a deputy overseer, or ever . mere stranger directed a surgeon to attend a poor man, such a person was clearly liable to pay the surgeon.

Verdict for the plaintiff; damages 15L

Maule, and Davis, for the plaintiff. Russel, for the defendant.

[Attornies—Harris and Warburton.]

No case has yet decided, that an overseer is compellable to pay a surgeon's biff. for attending a pauper of his perish, unless there has been an order by him, or a subsequent promise, or a knowledge of the attendance, and an acquisseence in it. It has been each treated, that the moral obligation of the overseer to provide physic for a pauper, is sufficient by itself to raise an implied assumpeit; but the tendency of the cases is to show, that this is a good consideration for a premise, but does not of itself amount even to an implied promise. See Watson v. Tarner, Bull. N. P.; Wennal v. Adney, 3 Boo. & Pull. \$47; Atkins v. Banwell, 2 Ea. Rep. 505, and Lamb v. Bunce, 4 M. & S. 275. Cases have also decided that a pauper hurt is casual poor, wherever he then happens to be, and that parish is bound to reimburse: this is laid down in the cases of Atkins v. Banwell and Lamb v. Bunce. I ought here to mention the case of Sneath v. Tomkins, in the Court of King's Beach, from the Norfolk Circuit, in Trinity Term, 1822; in which, in an action for surgeon's bill, it appeared that a pauper legally settled in the parish of A., met with an accident in the parish of B., where he was attended by the plaintiff, a surgeon; after the attendance, the defendant, who was overseer of A., in which the pauper was settled, gave an express promise to pay the plaintiff. At the trial the point of liability was reserved. In the Court above it was contended that the pauper being casual poor in B. the parish of A. had nothing to do with his cure; the Court recommended a compromise, which was acceded to; when it was intimated from the Bench, that two of the Judges thought it highly doubtful, whether, as the pauper was casual poor in B. there was any consideration for a subsequent promise by the overseer of A., and they had very great doubt's whether the action could be maintained, as this promise came within the rule of miduse pactum.

MONMOUTH ASSIZES,

(Civil Side.)

" SIR,

FOTHERGILL et al v. JONES,

A defendant cannot reduce a plaintiff's demand for goods sold by producing a debtor and creditor account in the hand-writing of the plaintiff's clerk, sold by defendant to plaintiff, unless he has pleaded or given notice of set-off.

This was an action for goods sold and delivered, in which the general issue

only was pleaded, and no notice of set off given.

*From the evidence it appeared, that the plaintiffs were owners of iron works; and also kept a general shop for grocercies, &c. to supply their own men, and other persons who might deal there. The defendant was a shoemaker: it appeared that the defendant dealt at the shop, and that the plaintiffs bought shoes of him for themselves and their men, and that each party kept a book, in which the opposite party wrote every dealing between them.

The plaintiffs' shopman was called to prove the delivery of groceries, and the defendant's counsel put into his hand a book, which he admitted contained a true account of groceries delivered on one side, and shoes delivered on the

other; the whole being of the witness's hand-writing.

was objected, that this account of shoes could not be set off, as no notice

set-off had been given.†

Puller, for the defendant, contended, that as the plaintiff's servant write the account, the shoe bill was so much written off the plaintiff's account, just the

same as if that amount had been paid in money.

HULLOCK, B., ruled, that though it might have been as Mr. Puller contended, if a balance had been struck between the parties; as it was, it was merely an account of a grocer's bill on one side, and a shoe bill on the other; just the common case of mutual debts, which could not be set off without a plea or notice of set-off; which not having been given here, the defendant could not avail himself of the *claim for shoes. His lordship recommended a compromise, which ended in a

Verdict for the plaintiff, for the balance.

Taunton, and Campbell, for the plaintiffs. Puller, and Cross, for the defendant.

[Attornies-Smith and Davis.]

[†] In country causes a set-off is sometimes pleaded, instead of notice being given of it which has the advantage of saving the expense of a witness to prove the notice; and as the notice ought to be as precise as the plea, there seems little disadvantage in so doing. But if pleaded, it is usual to plead also the general issue, so that you must be at the expense of leave to plead double, &c.

GLOUCESTER ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PARK.

FREEMAN v. ARKELL.

A plaintiff is not at liberty to give secondary evidence of the contents of a document, if his witnesses trace it to a person not connected with the cause, without calling that

In action for malicious prosecution, the plaintiff may call one of the Grand Jury, to prove

that the defendant was Prosecutor on the indictment.

Scable, that in action for malicious prosecution, the record, in setting out the indictment, saying, "then and there did make an assault;" the indictment really saying. "did then and there make an assault," is no variance. However, the Judge at the assizes will allow it to be amended, on summons; as he will, the word "plaintiff," for the word defendant," in the record.

And in such actions, the question of what is probable cause or not, is a question for

the judge.

This was an action against the defendant, for maliciously charging the plaintiff with an assault before a Magistrate, on which he was committed to prison; and on a bill being presented to the Grand Jury by the defendant, it was by This charge was variously laid in three counts; a fourth count them ignored. charged, that the defendant maliciously indicted the plaintiff, saying nothing of the proceedings before the Magistrate. Plea-Not guilty.

For the plaintiff, Dr. Timbrell, a Magistrate, was called to produce the information warrant, and depositions before him concerning the assault; he having had a *subpæna duces terum, for that purpose. This witness stated, that he had returned them to the Quarter Sessions, and had given them to Mr. Bloxsome, the deputy Clerk of the Peace, or to Mr. B.'s clerk, who

assisted him at the Quarter Sessions.

Mr. Bloxsome was called, he stated that he had no recollection of receiving the papers in question; they were not to be found after diligent search in the Clerk of the Peace office.

The plaintiff's counsel wished his Lordship to admit secondary evidence.

You have not called Mr. Bloxsome's clerk.

Pearson, replied, that they did not know of his existence; they called the Magistrate and the acting Clerk of the Peace, the only accredited officers; if they had them not, he submitted the plaintiff was entitled to give secondary evidence.

PARK, J. If they were lost, the plaintiff would be entitled to do so; but, as it is, for aught that appears, the clerk may have them now in his possession.

† In the case of Judge Johnson, 7 Ea. Rep. 66, and the other cases, where secondary evidence was admitted, there was strong reason to presume, that the writing was really destroyed; but the case most like the present was Rex v. The inhabitants of Castleton, 6 Ter. Rep. 236, where it was necessary to prove an indenture of apprenticeship of Martia Pidley: Nichelas Time, her master, when called, stated, that he had delivered it to a Miss Taylor of Beaford, to whom he had made a parol assignment of the apprentice. Evidence was given that Miss Taylor, who was living, but not called, had said she could not find it. The Sessions would not admit secondary evidence, because Miss Taylor was not called to prove the loss. The Court above thought the case too clear for argument, and that if the indenture could not be produced, evidence must be brought to show that it was lost or destroyed. Here it was traced to Miss Taylor, and no further evidence given. The Court had because of the Session. then confirmed the decision of the Session.

*Pearson then intimated his intention of proceeding on the fourth count; he recalled Mr. Bloxsome, who produced the bill ignored, (not a copy:) and called one of the Grand Jury, who proved that the defendant was the prosecutor on it.1

Taunton, objected, that, on the record, in setting out the indictment, there was a variance; the record being, "then and there did make an assault;" the

indictment, " did then and there make an assault."

PARK, J., said, it had been amended on a summons before him that morning, but he thought it no variance, even if it had not been amended. 'The plaintiff had at the same time amended, by altering a mistake in the record of "plaintiff" for "defendant."

*His Lordship said, that the question of probable cause or not, was a question for the Judge; and that the fact of a bill being thrown out,

was no proof of a want of probable cause.

Pearson said, he should also prove that there was in fact no assault.

The Judge thought the proceedings before the Magistrate formed so leading a feature of the case, that it could not be made out without them. His Lordship therefore

Nonsuited the plaintiff.

Pearson and Godson, for the plaintiff. Taunton, for the defendant.

[Attornies-Godson and Fryer.]

In Michaelmas Term, 1823, Pearson moved for a rule nisi for a new trial,

†You cannot, in an action for malicious prosecution for fellony, obtain a copy of the indictment except by application to the Court, where the trial took place; and an order indictment except by application to the Court, where the trial took place; and an order from that Court for it, or else a fat, to the same effect, from the Atterney General: but this is not so on an action for a malicious indictment for a misdemeanor. In Morrison v. Kelly, 1 Bl. Rep. 365, the Clerk of the Peace of Westminster was subpenced; and he produced the original record of sequittal: it was objected, that a copy, by order of the Court where it took place, should have been produced; Lord Manafeld said, that it was so in felony, but otherwise in misdemeanor. But even in felony, it was held in Legatt v. Tollersey. 14 Es. Rep. 302, that if the officer produced the record, or you could prove an authenticated copy, it was evidence, though not obtained by order or fat; but a discreet officer would apply to the Court, and state the circumstances, before he produced the record, or gave a copy.

the cord, or gave a copy.

This is generally proved by calling one of the Grand Jury; a Grand Juror may be called to prove any substantive fact within his knowledge, but not any thing which he hears as a Grand Juror, or which comes within his oath of secrecy.

Any small or verbal error, or omission in the record, can be rectified by applying to the Judge of Nisi Prius, at his lodgings, and getting a summons from him, for the other attorney to show cause: he then, after hearing both attornies, will, in his discretion, give an order for the alterations. The record is then altered by the attorney accordingly, and he pins on the Judge's order, as his justification for so doing. Besides alterations like the present, I have known an order given in an action against the Hundred for the demolition of a house in a riot. For inserting in the record after the day in the declaration, the words present. I have known an order given in an action against the rundred for the declaration, the words of a house in a riot, for inserting in the record after the day in the declaration, the words "and at divers other days and times." Formerly, none but a Judge of the Court that he record came from, could do this; and if no Judge of that Court was on that Circuit, the attorney was obliged to go on with the blunders, or to go to another Circuit of find a Judge of that Court. To remedy which, by the statute I Geo. 4, c. 66 \$ 5, it is enacted, that a Judge of either of the three superior Courts should, on the Circuit, make such orders on summonses, as he might do, if he were a Judge of the Court that the record came from.

If That the question of probable cause, is a question for the Judge and not for the Jury, was settled in the case of Golding v. Crowle, Say, Rep. 1: Denison, J., so held at the trial, and the Court above confirmed it. And in the opinions of Lords Mansfeld and Loughborough, reported in Sutter v. Johnstone. 1 Ter. Rep. 545, it is laid down, that "the question of probable cause, is a mixed proposition of law and fact: Whether the circumstances alleged to show it probable, or not probable, are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law; and upon this distinction proceeded the case of Reynolds v. Kennedy, 1 Wils. Rep. 232."

which was granted; and at the sittings of the Judges under the King's warrant, before Hilary Term, 1824, the rule for a new trial was made absolute.

HARPER v. COOK.

A plaintiff may give secondary evidence of the contents of a written paper, if those in whose presention it was, proved that they had made diligent search for it, and could not find it.

This was an action against the defendant, that, he and the plaintiff being joint collectors of King's taxes for the parish of *Mitchel Dean*, the defendant maliciously made an affidavit, that the plaintiff was a defaulter for taxes, whereby his goods were seized. Plea—General issue.

The commissioner, (Rev. Mr. Crawley,) before whom the affidavit was made, and his clerk, Mr. Lucas, proving that it could not be found after diligent search, the learned Judge admitted parol evidence of its contents.

Verdiet for the defendant, the want of probable cause not being sufficiently

made out.

Turnton and Curwood, for the plaintiff. Jerois and Campbell, for the defendant.

[Attornies—Williams, Goddard, and Lucas.]

*PREWIT *. TILLY.

In trespass quere clausum fregit, if the defendant justifies inter alia, that the locus is a free wheel for the inhabitants of O., an inhabitant of O. is an incompetent witness; but if the defendant's connect consent to waive that plea, he is incompetent.

This was an action of trespass, quare clausum fregit. Pleas.—The general issue, and several justifications; one of which alleged a right of free wharfage on the locus in que, in the inhabitants of Oldbury in the parish of Thornbury.

One of the witnesses for the defence was examined on voir dire, by Mr.

Taunton. He admitted that he was an inhabitant of Oldbury.

The learned Judge held him not a competent witness—But, on the defendant's counsel consenting to abandon the plea laying the right of wharfage as above, (of which abandonment the associate made a memorandum on the back of the record,) the witness's evidence was admitted.

Verdiet for the plaintiff.

Tramton and ——, for the plaintiff. Ludlow and Cross, for the defendant.

[Attornies-Rolph and Jefferies.]

*HARVEY v. REYNOLDS.

Leave and license to build a cottage on a common given by a commoner by parol. He can bring no action for the encroachment, though no sufficient common is left.

This was an action for injuring the plaintiff's right of common, at *Horseley*, by the defendant's building a cottage on the common. The defence was-

leave and license by the plaintiff.

It appeared in evidence, that the plaintiff was a farmer, and had a right of common in the locus, and that the defendant built a cottage there in the year 1821. It was admitted on all sides, that no sufficient common remained: but it appeared, that in August, 1822, there was a perambulation by the lord of the manor and freeholders, (among whom was the plaintiff,) for the purpose of examining what encroachments had been made. It was then proposed that the defendant, for this encroachment, should pay to the lord 15s. a-year, when the plaintiff himself asked that defendant should pay but 10s. a-year, and have a lease of it for ninety-nine years; and directions were given for such lease to be prepared: but in Michaelmas Term, 1822, before any lease was executed, the plaintiff brought his present action.

PARK, J., was of opinion that these facts clearly amounted to leave and license; and the plaintiff was therefore nonsuited, with leave to enter a verdict for the plaintiff, with nominal damages, in case the Court above should be of

opinion, that these facts did not amount to leave and license.

Jervis, having obtained a rule nisi for entering a verdict for the plaintiff—

*Taunton and Campbell now showed cause, and relied principally
on the case of Winter v. Brockwell.

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Jervis and Ludlow, in support of the rule, contended, that these facts did not amount to a license; for that, in fact, the plaintiff gives up his right of common without any equivalent, and that there was no evidence that the agreement for the 10s. rent was ever carried into effect; and at most only a conditional license; and the condition (the executing a lease) had not been performed.

HULLOCK, B. I conceive that it was a license, as soon as all parties had

agreed at the perambulation.

GRAHAM, B. The plaintiff was competent to give this license, as far as regards his own rights. He gives the license on certain terms; every thing is in train for complying with the terms, which is all that could be at the time the action was brought; but the plaintiff, instead of giving the defendant an opportunity of fulfilling the condition, brings an action. I think he was properly nonsuited.

GARROW, B., was of the same opinion.

HULLOCK, B. This case does not come exactly within that of Winter and Brockwell, which has been confirmed by other cases; but I think the nonsuit was right. I do not think that a commoner's expressing no dissent to an encroachment, at all bars his action as a license. If the plaintiff had not acceded to the arrangement at the perambulation, I think he could have maintained this action; but on that occasion he himself makes a proposition for the encroachment continuing on a certain payment being made: this is agreed to,

and if the money is not paid, the defendant is liable to pay it. I think the nonsuit was right.

Rule discharged.

In the case of Wister v. Breckwell, 8 East, 308, the plaintiff had given the defendant leave to put a skylight over his area, and afterwards, not liking it, he (plaintiff) had given the defendant notice to remove it. At the trial, Lord Bllenberough held, that the license being executed, it could not be revoked, at least not without the plaintiff's putting the defendant into his original situation, by paying him the expense he had been at in putting at the skylight. And on a motion for a new trial, his Lordship expressed the same opinion, and cited the case of Web v. Paternester, Palmer 71, where Haughton, J., lays down, that a license executed is not countermandable, but only when executory. In Teyler v. Waters, 7 Taunt. 374, the case of Wister v. Breckwell is confirmed; and the Court decide, that a license to be exercised on land, need not be by deed, nor even by writing.

CASES

AT

NISI PRIUS.

AT THE

SITTINGS AFTER HILARY TERM.

COURT OF KING'S BENCH.

SITTINGS AT GUILDHALL, AFTER HILARY TERM, 1824.

BEFORE LORD CHIEF JUSTICE ABBOTT.

PROMOTIONS

In this vacation, Lord GIFFORD, Lord Chief Justice of the Court of Common Pleas, was appointed Master of the Rolls, vice Sir Thomas Plumer, Knight, deceased; and Sir William Draper Best, Knight, one of the Judges of the Court of King's Bench, was appointed Lord Chief Justice of the Court of Common Pleas, vice Lord GIFFORD; and Joseph Littledale, Esq., was appointed a Judge of the Court of King's Bench, vice Lord Chief Justice Best. In Easter Term, William St. Julien Arabin, Esq., and Thomas Wilde,

Esq., were called to the degree of Serjeant at Law.

*LEA v. TELFER,

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An insolvent cannot maintain trover for plate, though his assignes does not interfere to prevent him.

TROVER for certain articles of plate. The defence was, that the plaintiff could not maintain his action, he having been discharged under the insolvent

debtors act; and as the plate was his property before his discharge, it had

become the property of the assignee.

A certified copy! of the schedule, with the order for discharge indorsed thereon, as well as the provisional and other assignments, were read, and the identity of the plaintiff proved; and it appeared that the action was not brought under any authority from the assignee.

The plaintiff's counsel, on being called on for his answer to the defence, submitted, that whatever might be the case with respect to the assignee, the defend int had no right to detain the property from the possession of the plaintiff; and urged that, in case of its being stolen, it might be laid to be the

property of the plaintiff.

ABBOTT, C. J. There may be possession as against a wrong doer, but there is no right of property to support trover. The question is, whether a man who is discharged under the insolvent debtors act, and who, in consequence, has assigned his property, can bring an action of trover? the assignee might do it, and therefore the insolvent cannot.

The plaintiff's counsel then referred to the exception in the act, of such

property of the insolvent as is under the value of 20l.

*ABBOTT, C. J. The exception is of wearing apparel and all such necessaries—that must be taken to be necessaries jusdem generis. I . cannot say that silver spoons and castors are fit for a man discharged under the insolvent debtors act. The creditors are clearly entitled to all the valuable property.

The plaintiff's counsel. I believe it has been held that the finder of property

may maintain trover.

ABBOTT, C. J. Not if the real owner is known.

The plaintiff's counsel. The assignee in this case has not interfered.

ABBOTT, C. J. I consider the case of an insolvent as analagous to that of a bankrupt; and a bankrupt may maintain trover for after-acquired property, unless the assignee interferes, but not for any property which he had before the bankruptcy.

The plaintiff was then nonsuited.

C. Phillips, for the plaintiff. Scarlett, for the defendant.

[Attornies—C. J. Brown, and Taylor.]

By the 45th section of the insolvent debtors act, 1 Geo. 4. c. 119, such capies are made

In the case of Amorary v. Delamaire, 1 Str. 505, it was held that the finder of a jewel might maintain trover against a person into whose hands he put it to ascertain its value; the real owner being unknown.

•148] "COSTER ". SYMONS, otherwise SHERWOOD.

A letier wristen by the inderser of a bill, is evidence for the defendant in an action by indorsee against acceptor.

Two was an action on a bill of exchange, drawn by one Show, on, and accepted by, the defendant, and indersed by Shaw to a person named share, and by Albers, to the plaintiff.

The prima facie case having been made out-

For the defendant it was proved, that he was merely the servant of Shaw, the drawer, and had no consideration for his acceptance; and that another bill had been given by Shaw to Akers, with his (Shaw's) name upon it, but to which the defendant was no party; which bill, it was contended, was in lieu of that on which the action was brought. And to prove that Akers knew of, and consented to such arrangement, it was proposed to read a letter addressed by him to Shaw, which Shaw swore related to the transaction in question.

Gazelee, for the plaintiff, objected. Akers is in existence, and may be called. I admit we are bound by any act of Akers, but not by what he says.

ABBOTT, C. J. I think, in a case at the last sittings, I admitted evidence of a similar description; and I believe the question is now before the Court, on a motion for a new trial. I will take a note of the objection.

The letter was then read. It contained a request to Shaw to bring the second bill with him, and concluded with these words, "this will take out

Sherwood entirely."

ABBOTT, C. J. I think I ought to receive this evidence. It is a declaration of the party under whom the plaintiff claims title, showing that he had no title at all. Shaw *put his name on the second bill to assist Sherwood, and Akers consents to this arrangement.

Akers was then called by the plaintiff's counsel; but his explanation not

being satisfactory, the jury, under his lordships direction, found a

Verdict for the defendant.

Gazelee, for the plaintiff.
Scarlett and Campbell, for the defendant.

[Attornies-Hodgson, Blackstock & Bunce.]

M'SHANE v. GILL.

An agreement between a bankrupt and a third person, that the bankrupt shall receive a sum of money from such third person on his obtaining from his assignees the sale of his house to that person, at a certain price, is void in law.

Work and labor. The plaintiff in this action, who has been a bankrupt, claimed the sum of 34l. 4s. from the defendant;—30l. for procuring the sale, at a certain sum, of his (the bankrupt's) house to the defendant, and 4l. 4s. for letting it after the purchase, in the capacity of a house agent. The 4l. 4s. had been tendered.

A witness proved a conversation which took place between the plaintiff and defendant. The defendant wished to purchase the house, and the plaintiff said to him, "Let us have a clear understanding: if you become a purchaser either by your own bidding or mine, I shall expect 30l., or five per cent. provided your purchase-money is under 600l." The defendant said, "Certainly, you shall have 30l.; but do not limit yourself within a few pounds of the 600l."

*Absort, C. J. If I understand this rightly, it is a bargain between the bankrupt and a purchaser, to obtain the property for him at a cer-

tain sum, in consideration of 301.?

The plaintiff's counsel replied in the affirmative.

ABBOTT, C. J. Then I am of opinion it is void in law: even though the assignees had consented, it is a fraud on all the creditors except them.

The plaintiff's counsel then examined one of the assignees, who stated that the plaintiff called upon him at his house.

The defendant's counsel objected to any thing that passed when the defend-

ant was not present.

ABBOTT, C. J. The plaintiff's counsel thinks that if he proves the consent of the assignees to the agreement, it will be good; and he is setting about

loine it.

The assignee stated that the plaintiff told him he had a friend who was coming to purchase the house, and if the assignees would give that friend the preference, he (the plaintiff) would have an interest in it. The property was eventually sold to the defendant for 560%, the assignees conceiving that it was bought for the plaintiff. It appeared that a meeting of creditors agreed to the price, at the bankrupt's suggestion.

The occupier of the house proved the letting of it to him by the plaintiff, as

the defendant's agent.

ABSOTT, C. J. I am clearly of opinion that an agreement, by which any person is enabled to buy the property at a certain sum, on giving the bankrupt *151] 30l., is void in *law. A communication of the agreement to all the creditors might make a difference, but a communication to the assignees alone will not do. But in this case there has been no communication to either, of any thing like the contract spoken to the witness. His lordship then called upon the defendant's counsel to prove the tender of the 4l. 4s. for the letting, which being done,

The plaintiff was nonsuited.

Marryatt, and Chitty, for the plaintiff. Scarlett, and D. Pollock, for the defendant.

[Attornies-Sabine and Hughes.]

HOUGH et al. v. WARR.

A letter from a surety for a collector to the obligees of his bond, stating that he will not be liable after the date of the letter, is no defence to an action on the bond for a deficit, subsequent to the letter, if it be not pleaded specially. If it be pleaded, quare.

Across on a bond against the defendant, as surety of the collector to the Bloomsbury Dispensary, of which the plaintiffs were the treasurers. Plea-General issue.

A witness proved the execution of the bond, and the collector himself proved his being a defaulter to the amount of between 2001. and 3001.

The defendant's counsel inquired whether his lordship thought a letter addressed by the defendant to the committee of the *Dispensary*, previous to the deficit, stating that he should not consider himself bound beyond the date of that letter, and that he had informed the collector of such his determination, could avail him in that action, or whether he must go into equity for relief.

ABBOTT, C. J. I think he must go into equity. His *lordship inquired if it had been pleaded, and was answered in the negative.

The defendants counsel.—Does your lordship think, that after such a notice they can be considered to have trusted the collector under the bond.

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ARBOTT, C. J. I think they may till it is revoked. At all events you should have pleaded it.†

Verdict for the plaintiff.

Nolan and Richards, for the plaintiff.

The Attorney General and Storks, for the defendant.

[Attornies—Passmore and Mills.]

† In Whelpdale's case, 5 Rep. 119 a. it is laid down, that in all cases where a bond is woldable, as if made by an infant or person under duress, and also in cases where a bond is made void by act of Parliament, it must be specially pleaded, and the year books (1 H. 7, 15, and 9 Edw. 4, 5,) are cited in support of this position; but if it ceases to be a deed, as hy erasure, the plea of non est factum is sufficient.

7, 1., and 9 Low. 4, 3, are cited in support of this position; but if it ceases to be a deed, as by erasure, the plea of non est factum is sufficient.

In Lambert v. Atkins, 2 Camp. 272, evidence that the obligor was, at the time of giving the bond, a feme covert, was admitted under the general issue. And in Faulder v. Jeswise. 3 Camp. 126, lunacy was allowed to be given in evidence, in action of debt on hond, under the general issue. The cases also go to show, that if the bond was void at common law, it may be taken advantade of under the general issue, but if it is void by statute, or is only voidable either by common law or statute, such matter must be specially pleaded; and in practice, infancy, gaming, usury, &c. always are so. I see no objection to pleading almost any matter of defence specially to debt on bond, as it makes no great difference in costs, whether you plead the general issue or a special plea, unless the plea be very long. It should be observed, that in debt on bond, the general issue is, non set factum, and not nil debet; and if the latter is pleaded by mistake (as it very often is,) the plaintiff may demur. In this form of action, payment must be pleaded specially; and so must a release.

*RUSSEN v. LUCAS, et al., Sheriff of Middlesex.

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Words such as "I arrest you" per se will not constitute an arrest; but if, after the words of arrest, the party goes with the officer, and so acquiesces, it is an arrest.

Acrion against the sheriff for an escape. The only point in dispute was, whether a person named *Hamer* was arrested by the sheriff's officer, and escaped.

The officer having the warrant went to the One Tun tavern in Jermyn street, where Hamer was sitting. He said, "Mr. Hamer, I want you." Hamer replied "wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

ABROTT, C. J. Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete: but, on these facts, if I had been applied to for an escape-warrant I would not have granted it.†

Nonsuit

Marryatt, and Tindal, for the plaintiff.
The Attorney General, and Holt, for the defendant.

[Attornies—Russen, and Smith, and Buckerfield.]

† In the case of Horner v. Battyn and others, 12 Geo. 2, (mentioned in B. N. P. 62,) it was held that if there be no actual touching of the party, but he acquiesces in the arrest, and goes with the officer, it is an arrest; therefore the question in the principal case was, whether directing the officer to go and wait for him, was not an acquiescence in the arrest, though it certainly appears to have been not an acquiescence, but a trial to evade the officer, and run away. In Gener v. Spark, 1 Salk. 79, it was held, that if the officer had touched the party to be arrested, and the party had instantly run away, this would have been a perfect arrest, and the running away of consequence an escape.

*BEYNON v. GARRAT and VENABLES, Sheriffs of London.

If, after a sheriff has returned to a f. fa. for 3011., that he has levied only 131., the plaintiff goes and receives that 131., he cannot maintain an action for a false return.

This was an action for a false return to a fi. fa. issued at the suit of the plaintiff, against a man named Rees, for 301l. The sheriffs returned that they had levied 13l.

The formal proofs having been gone through, evidence was given to show the return was false.

The defence was, that the plaintiff had gone to the secondary's office, and received the 131. Mr. Collinridge, the secondary, proved that he advised him to consider before he received the money, as it would waive any further claim he might have against the sheriffs. However, the plaintiff took the money.

ABBOTT, C. J. The plaintiff by accepting this money has in point of law waived all further claim against the sheriffs.

Plaintiff nonsuited.

[Attornies-Lichfield and James.]

DOE, on the Demise of SORE v. EYKINS.

If a lessor, after a forfeiture, advises a person to purchase the term of his lessee, he cannot maintain an ejectment for such forfeiture against that purchaser; but otherwise, if the party have an interest. e. g. an annuity secured on the premises, and the advice is "to take to them," merely.

EJECTMENT to recover the possession of some houses on account of the lease of them being forfeited by their not being finished, fit for habitation, within a time specified in the lease of them, granted by the plaintiff to a person named Bayley, who had assigned the lease to the defendant.

The prima facie case being made out-

For the defendant, a witness was called, who said, "I was present at an interview between the lessor of plaintiff and "the defendant. The defendant began to repeat a conversation which had taken place between her and Sore on London-Bridge, in which she said he advised her to purchase the premises of Bayley. He did not expressly deny it, but appeared to be very uneasy, and said, I did not advise you to become the tenant; I advised you to take to the premises." On the witness's cross-examination he said, "that the defendant had an annuity from Bayley, secured on the premises in question, which she had got before the conversation which was alleged to have taken place on London-Bridge."

ABBOTT, C. J. If the conversation had been, as was supposed on the part of the defendant, that Sore advised her to purchase the premises, I quite agree that, as against her, he would have no right to insist on the forfeiture; that is, if he advised her to take an interest, she having no interest before: but the advice he gave her was, "to take to the premises." She had an annuity

secured on them, and was in consequence interested to get the houses finished. In point of law the plaintiff is entitled to a verdict, having made out his case. Verdict for the plaintiff

Scarlett, and Chitty, for the plaintiff. The Common Serjeant, for the defendant.

[Attornies-Rich, and F. and H. Martin.]

The courts always lean against forfeitures, and therefore, when a forfeiture has taken The courts always lean against forfeitures, and therefore, when a prefeture has taken place, if the landlord does not act after notice of the forfeiture, to waive it, he cannot subsequently take advantage of it. Receiving or distraining for rent is a waiver of all antecedent torfeitures which the landlord knew of at the time. But in Doe, d. of Sheppard, v. Allen, 3 Taunt. 78, where the lease was to be forfeited, if the tenant assigned to a butcher, it was held, that not insisting on the forfeiture for six years after it had happened, wasno waiver, but that some positive act of waiver was necessary; though Massfeld, C. J., lays down, that if it had been proved that a great deal of money had been laid out in making the premises into a butcher's shop, and the plaintiff lay by and saw it, it would be attong evidence from which the intre might imply consent to the alteration. he strong evidence from which the jury might imply consent to the alteration.

*CLARK v. LUCAS, et al.

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The assistant to a sheriff's officer, who is left in possession under an execution, is a competent witness for the sheriff in an action for a false return.

Action against the defendants as sheriffs of Middlesex, for a false return of nulla bona to a fi. fa. against a person named Gooding.

An examined copy of the judgment in the case of Clark v. Gooding, and

also of the writ with the sheriff's return indorsed, were put in and read.

It was proved that there was property on Gooding's premises to the value of at least 1001. more than the sum required to be levied, and that some of the goods were removed during the time the man remained in possession under the execution.

The defence set up was, that prior to the execution Gooding had committed an act of bankruptcy; and with respect to the removal of goods, that the plaintiff alone was in fault; because he directed the man in possession to confine himself to the back part of the house, it being a public house, and Gooding still continuing to carry on the business there.

No point arose in the evidence offered to establish the first part of the

defence.

To make out the second part, the defendant's counsel, among other witnesses, called the person who was in possession, as the assistant or deputy of the sheriff's officer.

Wilde, for the plaintiff, objected. This witness is *interested. The sheriff may recover against the officer, and the officer against the assistant.

Scarlett, for the defendant—That circuity was never yet allowed. The practice has always been to examine the assistant. There is no security given by the assistant.

Wilde. I have offered evidence to show that this witness suffered goods to

be improperly removed.

ABBOTT, C. J. The judgment in the action by the sheriff against his officer would be evidence against this witness, but not the judgment in this case.

I admit that the record in this case would not be evidence against the witness; but still I contend that he is interested. The amount of damages

in the second action may be regulated by the amount recovered in this cause. I allow that generally persons in the witness's situation may be examined; but my objection is founded on the particular circumstances of this case. He is in

charge, and will be ultimately responsible.

ABSOTT, C. J. I think the objection does not apply to the competency, but only goes to the credit. The rule which of late has been laid down is this: a witness is incompetent if the judgment in the action in which he is examined can be evidence either for or against him; that is the general rule. Now, the judgment in this action would not be evidence either for or against this witness, and therefore I think him competent.

Wilde, for the plaintiff. Scarlett, for the defendant.

[Attornies—Martineau & M., and Watson & B.]

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*WILLIAMS, et al. v. MUDIE, et al.

An attorney is bound to disclose communications made to him, which do not regard sither the bringing or defending an action.

The plaintiffs in this action were wholesale stationers, and sought to recover from the defendants, as proprietors of the *Leeds Gazette*, the amount of their bill for stamps and paper, furnished at various times, for the carrying on of that concern. The difficulty was in proving the partnership of the defendants. The plaintiff's counsel, after examining a variety of witnesses, were driven to the necessity of calling the attorney for the defendants. He was questioned as to certain communications made to him at former periods, when he was concerned for them professionally, but not with a view to any cause. He appealed to the Court to say whether he was obliged to answer.

ABBOTT, C. J., held, that he was bound to disclose such communications as were made to him by the defendants previous to this action. Whatever, said his lordship, is communicated for the purpose of bringing or defending an action, is privileged, but not otherwise. This was held in a case on the Mid-

land Circuit in the time of Serjeant Adair.

Scarlett, for the defendant. I am aware that your lordship has admitted evidence of a similar description several times before, and that your lordship has laid down the rule more liberally than your predecessors; but I submit that the law is clear, that any communication, whether about an estate or otherwise, is a privileged communication. It was so decided by Lord Hardwick, in the case of the conveyancer to the Eust-India Company.

ABBOTT, C. J. I have considered the subject a great deal, and my mind is

made up upon it.

*The witness was then examined, but the answers he gave not establishing the partnership, and there being no further evidence on the subject, the plaintiff was nonsuited.

F. Pollock, and Wilde, for the plaintiffs. Scarlett, and Anderson, for the defendants.

[Attornies—Tilson & P., and Robinson, Son, & Battye.]

¹ The case of Wilson v. Rastal, 4 T. R, 753, decides that confidential communications to counsel, attornies, and solicitors, in those capacities, are privaleged. But in Cobden v.

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Kendrick, 4 T. R. 431, the Court say, that the difference is, whether the communication were made by the client to his attorney in confidence, as instructions for conducting his cause, or gratis dictum. If it was not the former, the communication is admissible in evidence. In Res v. Withers, 2 Camp. 578, it was ruled by Lord Ellenhorough, that if a party who is assaulted go to an attorney to consult him on it, such attorney cannot be allowed to give evidence of that communication on an indictment for that assault, to show allowed to give evidence of that communication on an indictment for that assault, to show that the prosecutor gave a different account of the transaction. In Fountain & Another Vosag, 6 Esp. 113, a party had sent for the witness, supposing him to be an attorney, and made a confidential communication to him as such. The witness was really clerk of the papers in Newgate; but had formerly been clerk to an attorney. Manskeld, C. J., held, that the privilege was only as to attornes, and that no such privilege extended to persons situated as the witness was. In De Barre v. Livette. Peaks, N. P. C. 77, Lord Kenyon held, that the interpreter, through whom a party, who was a foreigner, communicated with his attorney relative to the party's defence at the Old Bailey, on a charge of felony, could not be permitted to give evidence of such communications.



*DOE, on the Demise of PITT, v. HOGG.

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The depositing a lease in the hands of brewers, for money lent, is not within the meaning of a provise for re-entry, which is to take effect if the leases, his executors, &c. should "grant any underlease, or assign, transfer, and set over, or otherwise part with the lease or premises, without license."

EJECTMENT to recover possession of the Grigsby's Coffee-House, in consequence of the forfeiture of the lease under a proviso for re-entry, which was to take effect if the lessee, his executors, &c. should grant any underlease of the premises, or "alien, sell, assign, transfer, and set over, or otherwise part with the lease or premises, without the license of the lessor."

It appeared that the lessee, having occasion to borrow some money of Messrs. Combe & Co. the brewers, deposited the lease in their hands, and Messrs. Combe & Co., on the receipt from Messrs. Reid & Co. of the sum advanced, delivered it over to them.

Scarlett, for the plaintiff, contended, that this was within the meaning of the

proviso, it being a parting with the lease.

Gurney, for the defendant. I submit that the parting in this case was only a parting with the manual possession; and a parting with it, to work a forfei ture, must be a parting with the property of the lease. It is, in fact, no more than depositing it at a banker's. The lessor has not guarded against a mere And he cited the case of Doe and Bevan, 3 M. & S. 353.†

*Scarlett, in reply. The distinction between this case and the one cited is, that in the latter the words of the proviso only applied to an assigning, but in the former they include both a legal parting, and any other parting, with the lease. The deposit communicates an interest to the party receiving it.

[†] The great point made on Doe, d. Goodbekere, v. Bevan, 3 M. & S. 353, was, whether the assignees of a bankrupt selling a term under an order of the Lord Chancellor has ancurred a forfeiture under the words in the lesse, that "the lessee, his executors, admin intrators, and assigns, should not during the term assign the indenture, or his or their interest therein." The Court held, that the term "assigns" must be taken to mean voluntary assigns, and not assigns by operation of law.

ABBOTT, C. J. I think, upon the whole, it will not do. Mr. Scarlett shall have leave to move to enter a verdict for the plaintiff.

Nonsuit

Scarlett, and Adams, for the plaintiff.
Gurney, and Hutchinson, for the defendant.

[Attornies-Adlington, and G., and Whitton.]

In Easter Term Scarlett moved, pursuant to the liberty reserved at the trial, and the Court refused his application.

DITCHER v. KENRICK.

In action of covenant, the attorney of a third person who holds the deed as such, is not bound to produce it, but the plaintiff may go into secondary evidence. An attested copy, on 1s. stemp, is admissible as secondary evidence.

This was an action of covenant. An attorney was called, and required to produce the deed. He said he had it only in his character of attorney for a third person, and appealed to the Court whether he was bound to produce it. Absort, C. J., thought he was not, and told the plaintiff's counsel they might give other evidence. A witness was then called, who produced an attested copy.

*The defendant's counsel submitted that there might be two parts of the deed.

ABBOTT, C. J. I shall not presume there is another part; it must be shown. The attorney was then recalled, and said, that there were two parts, and one was delivered over to Mr. Brace, who had been the plaintiff's attorney, but was since dead. The attested copy appeared to have been made at the office of the witness, who declined to produce the original.

The witness then proved having searched at Brace's chambers for the deed

without success.

The attested copy was then about to be read, when the defendant's counsel further objected, that it had not got the proper stamp, being only marked with a shilling stamp; whereas the act requires that a copy made for a party to a deed must have the same stamp as the deed itself.

The plaintiff's counsel replied, that the observation was true where the copy was produced as original evidence; but in the present case it was only offered as secondary proof.

Assort, C. J., overruled the objection, and there being no other answer to the case, a verdict was found for the plaintiff.

Nolan, and Goulburn, for the plaintiff.

E. Lawes, for the defendant.

[Attornies-Monins, and Beckett, and Wimburn, and Collett.]

[†] By 55 Geo. 3, 184, (the stamp act,) it is enacted, that every attested copy of any agreement, bond, instrument of conveyance, or other deed, shall bear the same stamp as the original instrument, if made for the security or use of any person taking benefit under sach instrument; but if made for the benefit of any person not taking bunefit under the instrument, it is to bear a shilling stamp.

HORNCASTLE et al. v. MOAT.

Declaration in tort, stating that the defendant, on the sale of Tenerife Barilla, asserted that 7½ cwt. would produce a ton of soap, well knowing that it would not do so, is not supported by evidence that he said he had made 7 tons of soap out of 51 cwt., and no proof of the scienter.

The declaration in this case stated, that the plaintiffs bargained with the defendant for some *Teneriffe Barilla*, and that the defendant asserted of it, that seven and a half hundred weight would make a ton of soap, well knowing that it would not do so: whereby the plaintiff was induced to take it, and in consequence sustained a loss. The defendant pleaded *the general issue. The Lord Chief Justice inquired if the declaration was in tort, and was answered in the affirmative.

For the plaintiff, the broker, who purchased the article, was called; who proved that the defendant produced a sample, and said that he could speak to its goodness, for he had used it, and made seven ton of soap with fifty-one hundred weight. The sample was taken to the plaintiff's, and tried by their process, and approved.

The contract was then read. It specified merely the date, the parties'

names, the quantity sold, the price, and the mode of payment.

ABBOTT, C. J., inquired what evidence there was to prove the scienter.

The plaintiffs counsel replied, that he had no other evidence than the differ-

ence between the quality of the sample and that of the bulk.

ABSOTT, C. J. If there had been any warranty in the contract, or any thing saying that the bulk was to be like the sample, then that might do. But I cannot infer a fraud, or ask the Jury to infer a fraud, because the result of one man's experiment differs from that of another's. Besides, in the declaration it is laid, that he asserted that seven and a half hundred weight would make a ton, whereas the proof is, that he said, fifty-one hundred weight had produced seven tons. It might be true, as to the larger quantity, and not as to the smaller. As there is no warranty, the plaintiff must be called.

Nonsuit.

Gurney, and Platt, for the plaintiffs. Scarlett, for the defendant.

[Attornies-Orchard and Rogers.]

† In cases of this sort the declaration is not usually in tort, but in contract, that the defendant assured, and faithfully promised, &c., and you add the common money counts.

*DAMER v. LANGTON.

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In an action for work and labor, when the plaintiff has established a quantum meruit, if the defendant's witness prove the existence of a written contract, and the plaintiff insist on the defendant's producing it, and it is not produced, the plaintiff must be called: but if the plaintiff does not require its production, the case may proceed.

This was an action to recover the sum of 101. 10s. for erecting a tent, or temporary room, on the defendant's lawn. The plaintiff's witnesses established a quantum mervit, and on the cross-examination of the defendant's agent, who was called for the defendant, and who had negotiated with the

plaintiff in the affair, it came out, that he had written the terms in his book, which had been signed by the plaintiff.

Park, for the plaintiff, submitted, that this must be produced by the defendant.

Marryall, for the defendant, observed, that if there was any contract, the plaintiff wanted it as much as the defendant.

ABBOTT, C. J., inquired of Park if he meant to call for it.

Park said, certainly not, but he should insist on the defendant's producing it.

Assorr, C. J. If you insist that there is a written contract, then I think

that the plaintiff must be nonsuited.

Park submitted, that the rule was settled, that if on the cross-examination of the plaintiff's witnesses, it came out that there is a written contract, the plaintiff, in such case, must be nonsuited. But when the plaintiff has proved a quantum meruil, and the fact of the existence of such contract comes out in the progress of the defendant's case, then he is bound to produce it.

*ABBOTT, C. J. You cannot go on a quantum meruit if there is a written contract. If you insist on the contract, I think the plaintiff must

be called.

Park then withdrew his objection, and the case went on, as if there had been no written contract.

Verdict for the plaintiff.

Park, for the plaintiff.

Marryatt, for the defendant.

[Attornies-D. Willoughby, and Mason.]

DUNCAN v. GARRATT et al.

If the plaintiff has bought sails of the sheriff under an execution, with a knowledge that they are deposited at a sailmaker's, and does not apply for a delivery till after the time when the sheriff is bound to pay over the money, he can maintain no action against the sheriff, if the sail maker refuses to deliver them up.

Acrion against the defendants as Sheriffs of Middlesex. The plaintiff purchased at a sale, under an execution, two-thirds of a vessel, in the month of August. The sails were described in the inventory, as being at a sail-maker's, of the name of Walson. The plaintiff received an order from the sheriff, on Watson, for the delivery of the sails, but did not present it till the month of May following, after he had sold the two-thirds to Messrs Ellerby and Cound, and bound himself to deliver the sails to them, or pay 60l. The sail-maker refused to deliver them up, saying he had a lien on them, and the plaintiff paid the 60l. to Ellerby's, and gave notice to the sheriff, that he should require the production of the sails, or hold him liable for the money he had been obliged to pay. It appeared that the sail-maker said when the sheriff's officer seized the sails, that he had no charge for repairing them.

*The plaintiff was nonsuited, on the ground that he had kept the order in his possession unused, till after the time when the sheriff would be bound to pay over the money, and thereby prevented him, in the event of a refusal to deliver up the sails, on account of a lien, from discharging that lien,

and reimbursing himself out of the funds in his hands.

Marryatt, and Wilde, for the plaintiff. Scarlett, and Holt, for the defendant.

In Easter Term Marryatt moved for a new trial, contending, that if a man sends for articles sold, as soon as he has occasion for them, it is all that is

required by law.

ABBOTT, C. J. I thought, at the trial, that if you had gone to the sail-maker, directly after you received the order, and found that he had a lien, you might have maintained your action against the sheriff; but as you waited from August till the May following, during the interval between which months the sheriff would be bound to pay over the money, you cannot recover. You must be sonsidered as having accepted the order in substitution for the goods.

The other Judges expressed themselves of the same opinion.

Rule refused.

*LANG v. ANDERDON.

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Policy of insurance on "ship or ships" warranted to sail from Demarara on or before the 1st of August. The ship (a small one) sailed on that day two and a half miles, and then anchored at a place nearer the town than large ships can come. This is a "sailing from Demarara" within the policy.

This was an action on the policy of insurance on a ship or ships, from Demerara to England. The only question in the case was, whether a ship called the Iris, had complied with the warranty in the policy, "to sail from Demerara on or before the 1st of August."

The only witness called, was the captain, who proved, that in the month of July the Iris was at Demarara, taking in her lading for England, and was lying even with the town, about half a mile above the fort, which is at the point of the land; that she completed her lading on the 28th of July, and finally cleared out on the 31st, and was then quite ready for sea; that she weighed anchor on the 1st of August, about one in the day, and came out of the river and proceeded to a distance of about two miles and a half from the place where she took in her cargo; that the wind was adverse but light; that she then came to an anchor by desire of the pilot, who said she would be in a better birth there, for getting underweigh with the next tide; that about ten miles farther on, there is a shoal or bar, after getting over which, the pilot usually leaves; that on the 2d of August she proceeded on her voyage direct for England; that she had no communication with the shore after her first weighing anchor, except that a boat brought some letters off, with which he (the captain) had nothing to do. The witness further said, that his instructions were to said before the 12th of August, and he knew nothing of any policy.

On his cross-examination it came out, that ships of a large size load outside the shoal, or bar, but such as are of the size of the vessel in question, load about the place where that vessel did.

For the plaintiff, it was contended, that the words of the policy being, warranted to sail," what had been done was a compliance with the warranty. If it had been to depart the case might have been different. The case of Moir v. the Royal Exchange Assurance Company, 6 Taunt, 241, was cited, and it was argued, that if a vessel is in port, and begins to weigh anchor, it is a sailing; and if the ship in question had not quitted the port, the plaintiff would have been entitled to recover; a fortiori, was he entitled, she having proceeded so far out.

Scarlett, for the defendant.—The case cited is in the defendant's favor. It discovers the principle on which the warranty is given. I agree that there is a difference between a warranty to sail and a warranty to depart. But in all the cases referred to by the learned Judge in the case cited, the warranty was " to sail," and not as in this case, to sail from. A man may commence his voyage without leaving the port. If he bona fide begins to move, and by perils of the sea is obliged to stop, this will be a compliance with a warranty to sail. But, "to sail from," is equivalent to "to depart;" to depart, is to go from; and to sail generally, is to begin the voyage. To depart, according to the latter cases, is to leave the place. The word from, is exclusive; sailing may be in a port or harbor. It appears, on the evidence, that ships at Demerara lie indiscriminately, a certain distance up the river, and a certain distance below it. But some large vessels take in part of their cargo within the bar, and then go outside it, and in both situations communicate with the Custom House. Now, supposing this vessel had been one of the large ones, and had not finally left till the 2d, would it have been a sailing from Demerara? That part where the Iris lay, is the roadstead, and there was no departure, because she might have loaded afterwards. It must be taken, that the meaning of the underwriter is a departure from the limits. How does he know whether the vessel is large or small? There is nothing within the four corners of this policy, to say, that if this is a small vessel it means one thing, and if it is a large one it means another; and therefore it must be taken to mean a sailing from all the places where vessels are accustomed to take in their lading. Demerera does not mean the town. In mercantile transactions, these warranties should have a construction not varying according to the size of the vessel. contend, that Demerara means all those places where vessels load, and there-

fore there must be a sailing from such places. Would not a policy "at Demerara" attach to a vessel laying outside the bar, to take in her lading? ABBOTT, C. J. The single question in this case is, whether within the meaning of the policy, the vessel in question sailed from Demerara on the 1st of August. The construction of these instruments must be referred to the usage of trade. If it had rested on the examination in chief of the captain, I should have been clearly of opinion that she had brought herself within the policy. But on the cross-examination, a material fact came out, which raises a doubt upon the subject. We learn from it, that vessels of a large size are obliged to go down below the shoal, or bar, in order to take in their cargo. I quite agree with the learned counsel for the defendant, that a policy at, and from Demerara, would attach to a vessel lying there for that purpose. But I do not know that that is decisive. The words may be understood, with refereace to the subject matter of the instrument. It is true, also, that if this vessel had been a large one, it could not have been considered as having sailed. There must be a sailing on the voyage, and that cannot be said to take place while any thing remains to be done. In the present instance, every thing had been done, but the vessel had not got so far as the place where one of elarger size would be. There is, however, some difficulty in putting two different constructions on one instrument. This policy is "on a ship or ships," and we might be called on to say, on the same policy, that what was a sailing in the case of one ship, was not so in the case of another. If we understand sailing from a place, to mean commencing the voyage, having every thing done, and waiting only for wind and tide, then I think this is a compliance with the warranty, and the plaintiff is entitled to a verdict. But if, on the other hand, we are to take that the warranty must be, to sail from the place where every ressel, whatever her size, may lawfully lie, then the verdict should be for the

The jury, which was special, then found their

The Attorney General, Gurney, and Kaye, for the plaintiff. Scarlett, and Campbell, for the defendant.

Attornies-Freshfield & K., and Reardon & D.]

In Eastern Term, Scarlett obtained a rule nisi for a new trial.

CUXON, et al., Assignees of SWEET, v. CHADLEY.

Whether the assignees of a party who has become bankrupt can recover a debt due from the defendant, if the bankrupt, before his bankruptcy, agreed to set it against a debt that he owed the defendant's brother, such arrangement not being in writing.—Quere.

This was an action by the assignees of Sweet, a bankrupt, to recover from the defendant James Chadley, the price of some goods sold to him by the

bankrupt.

*For the defendant it was proved, that Robert Chadley, his brother, who was also a bankrupt, had had dealings with Sweet; that Sweet owed him money, and that an application was made by him to Sweet, to carry James's debt to his account, to which Sweet assented, and by his desire made an entry in a book some months before the bankruptcy of either party, in these terms: "Your brother's account for frames, glasses, &c. 141." Robert told his brother of it about a fortnight afterwards, and gave him credit for the amount. Robert owed James money.

Gurney, for the defendant, submitted that the bankrupt having agreed to take Robert instead of James, the assignees could not now recover against James.

Marryatt, for the plaintiff, observed, that there should have been an under-

taking in writing.

ABBOTT, C. J. I rather think it is so. It seems not a discharge of James. The verdict must be for the plaintiffs, with leave to Mr. Gurney to move to enter a verdict for the defendant.

Verdict for the plaintiffs.

Marryatt, for the plaintiffs. Gurney, and Holt, for the defendant.

[Attornies-Wade and Hodgson.]

In Easter term, Gurney moved, pursuant to the leave given at the trial, and obtained a rule nisi.

*ADJOURNED SITTINGS AT GUILDHALL,

BEFORE LORD CHIEF JUSTICE ABBOTT.

PARK et al. v. PROSSER.

A creditor has a right to call on his debtor for his money at the debtor's lodgings, or other place where he knows him to be, though it is not his place of business, and a denial to a creditor there is as much an act of bankruptcy as if it were his place of business.

This was an action by the assignees of Miller, a bankrupt, to recover some money paid by him to the defendant, after he had committed an act of bankruptcy; and the only question was as to the validity of the act of bankruptcy relied on.

It appeared that the money in question was paid on the 15th of March, 1822. A sheriff's officer proved, that he arrested Miller on the 16th of March; and a widow lady, named Smith, with whom he lodged, at Pentonville, proved, that a creditor of the name of Manton came several times in the course of the formight preceding the arrest, and that, in one instance, Miller saw Manton at a distance, coming to the house, and said to the witness, he is coming, and I am not in the way, and the servant denied him in consequence, in her hearing. This was before eleven in the morning. The witness further stated, that on several occasions Miller had said, "If any person calls for me, I am not at home." On cross-examination she proved, that the bankrupt was in the habit of leaving her house in the morning, and going to the George and Vulture, in Comhill, where he had a room for the purposes of his business.

The clerk of Manton, the creditor, proved, that he went three times to Miller's lodgings, to demand the money due to his master, and saw him there on two of the occasions. On his cross-examination he admitted, that once when he called he was told to go to the George and Vulture, where he went in consequence, and saw Miller, who did not then make any complaints of his calling at Pentonville, on account of its not being his place of business.

Gurney, for the desence, then called the landlord of the George and Vulture, who proved, that Miller took a bed-room and sitting-room there, which he kept till he was arrested; and people called on him continually, whom the witness knew to be merchants, and that Miller never gave directions that he should be denied to any one; but all saw him if he was at home.

Manton, the creditor, was also called, and proved, that in December, 1821, and afterwards, he called on Miller several times at the George and Vulture, and knew it to be his place of business, and he never had any difficulty in gaining access to him there; that in the beginning of the year 1822, he discovered that he slept at Mrs. Smith's, at Pentonville; and, when going into the city, he sometimes called on him there; but Miller made an objection to his doing so, on account of Mrs. Smith's character, which, he said, might suffer if he were known to reside with her. This was in February, and Miller said Mrs. Smith's house was his private lodging, and his place of business was the George and Vulture, and he was always to be found there. The witness further stated, that he never pressed Miller for money, and had not been slarmed before he heard of the arrest; but would have given him credit for 10,000l.'s worth of guns.

ABBOTT, C. J. We may take it in this case, that Miller wished persons not

to call on business at Pentonville, but at the George and Vulture, but I conceive that a creditor has a right to call on his debtor any where. Besides, if it had been his object, as is suggested, to have it thought that he did not lodge with Mrs. Smith, the answer to those *who called would have been, not that he was not at home, but that he did not live there. I think also, that Mr. Manton's sentiments about the solvency of Miller are better to be gathered from his acts at the time, from the circumstance of his so frequently calling upon him, than from any opinion he may feel inclined to deliver now upon the trial.

The jury requested that Mr. Manton might be asked whether he had any collateral security for his debt? and receiving an answer in the negative, and in addition, that he had not been promised any, brought in their verdict for the plaintiff, establishing the act of bankruptcy.

Scarlett, and Campbell, for the plaintiff.

Gurney, for the defendant.

[Attornies—Kearsey & S., and Oakley.]

SCHLENKER v. MOXEY et al.

If A. has lent money on a deed of assignment, which is deposited in his hands, he is not compelled to produce it on the part of the assignor, in an action between the assignor and a third person.

In this case, among other matters, it was necessary, on the part of the defendants, to obtain the production of a deed of assignment from them to a man named Wade. A witness was called, who acknowledged that he had it in his possession, that it was left with him by Wade as a security for money he had lent him, and he thought his interest might be affected by the production of it.

Scarlett, for the defendant, submitted that the witness ought to be compelled

to produce it.

Abbott, C. J. I cannot make a gentleman produce *his deed. He says, it may affect his interest; I cannot say it may not; it may appear to want a stamp, or to have some other defect.

Scarlett. If Wade had required him to produce, then the case might have

been different; he may have a right to withhold it as against Wade.

ABBOTT, C. J. I do not know that he has not a right to withhold it against all the world. Moxey might have taken a counterpart. If he produces it, it may turn out to be an invalid security.

Scarlett. It is merely a deposit.

ABBOTT, C. J. Then he may lose the value of his deposit. It must be a very strong case indeed to induce me to call upon a man to produce his deed. Besides, the difficulty may always be guarded against.

The facts in the cause were afterwards turned into a special case, and it was agreed to make it part of the case, whether his lordship was right in refusing to make the witness produce the deed.†

Marryatt and Curwood, for the plaintiff. Scarlett, for the defendants.

[Attornies-Willie & M., and Argill.]

T It a person receives a subpana duces tecum to produce a deed, &c. he ought to take i with him to the trial, and if he dislikes to produce it, he ought to make his objection, and the judge will decide whether he must produce it or not.

•CURTIS v. HUNT, et al.

In answer to a plea of pleae administravit, proof that the deceased's property was sworn under a certain sum is prima facis evidence of assets to the amount of the smallest sum, that would pay the same probate duty as the sum sworn to.

This was an action of covenant by the plaintiff, as representative of a lessor, against the defendants, as executors of his lessee, for not repairing. There was a plea of plene administravit, which the plaintiff denied. The probate of the lessee's will was produced, dated 27th May, 1796, and his property was sworn under 5000l. On a reference to the stamp act of that time, it appeared that the next lowest sum was 2000l., i. e. that the probate duty appeared to have been paid for a sum between 2000l. and 5000l. This, it was contended, was evidence of assets to the amount of the smaller sum. It appeared that the premises in question were bequeathed by the will, and the legatee had been let into possession.

Gurney, for the defendants. At this distance of time the plaintiff should give evidence to charge us with the possession of assets. It is twenty-eight years ago. In ordinary cases the statute of limitations has effect after six years, and surely twenty-eight is much too long for the case of executors.

ABSOTT, C. J. The executors might have taken an indemnity from the legatee. Here is prima facie evidence of assets to the amount of 2000l. in the duty paid upon the probate. The executors also might have kept the premises to answer the expenses of repairs. It is unfortunate for the executors; but the lessor must not suffer, because they neglected to do what they might have done Verdict for the plaintiff.

•181] •F. Pollock, for the plaintiff.
Gurney and Comyn, for the defendants.

[Attornies—Wadeson and Potts.]

HORDERN, et al., v. DALTON.

If a post-master has agreed to deliver letters in a particular mode, and by mistake does not deliver one for two days, that letter containing a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonor in time, if he sent a special messenger, though too late to do so by post.

The plaintiffs were bankers at Dudley, in Worcestershire, and the defendant was post-master there. In the year 1815, a clerk of the plaintiffs' named Leadbeter, made an agreement with a Miss Driver, who conducted the business of the post-office, for the plaintiff to pay 10s. 6d. a-year, in consideration of which a box was to be provided for the plaintiff's letters to be kept in till they were sent for. On the the morning of the 9th of February, 1822, a letter was brought to Leadbeter, by the letter-carrier of Dudley, who said he was desired to say, that he was sorry it had not been delivered before. Leadbeter opened it in his presence, and found a returned bill and note, which eught to have been delivered on the 7th, and of which, in consequence of the delay, the plaintiffs alleged that they could not procure payment, not having time to give notice of the dishonor to the parties. They therefore brought this action to recover the amount from the defendant. The plaintiffs had regularly sent for their letters

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both on the 7th and 8th. There were many such boxes, or pigeon-holes, in the office, and the letter in question was put by mistake into the one imme-

diately adjoining that of the plaintiffs'.

It came out, in the progress of the defendant's case, that the parties to the bill and note all lived within a moderate distance of *Dudley*, and that although the post could not reach them in time, yet, if special messengers *had been sent off, the notices of dishonor would have been sufficient.

ABBOTT, C. J., in consequence of something which fell from the jury, observed to *Taunton*, who was counsel for the plaintiffs, that the jury seemed

to be of opinion, that a special messenger ought to have been sent.

Taunton. The law does not require that trouble.

ABBOTT, C. J. If you charge any body with a loss arising from mistake, you should show that no due diligence could have been used by you, which might have prevented that loss.

Taunton. All that I can say then is, that due diligence must mean all that

the law requires.

His lordship then directed the plaintiffs to be called, at the same time observing, there was another great point behind, viz. whether this 10s. 6d. was any thing more than a Christmas-box to the post-master, for these pigeon-holes. He thought, if the 10s. 6d. was to be considered as making the post-master liable, it would cause commercial men to lose the benefit of such an arrangement; for no post-master could stand it.

Nonsuit

Taunton, Tindal, and E. Lawes, for the plaintiffs. The Attorney General and Gurney, for the defendant.

[Attornies-Whitaker and Parker.]

*DE LAMA v. HALDIMAND.

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If a consul is acting between party and party, though he acts as consul, he may receive fees; but if he acts for his Government he is not entitled to any.

This was an action for work and labor. The plaintiff was the Spanish consul, and the defendant the agent of Messrs. Ardouin, Hubbard, & Co., who

were contractors with the Spanish Government.

The only witness called was the defendant's clerk, who proved that, in consequence of an article in the treaty between the Spanish Government and the contractors, which provided that the latter might effect the delivery of certain bonds into the hands of the Spanish consuls at Paris, Amsterdam, and London, whose receipts for the same should be acknowledged at Madrid; the defendant applied to the plaintiff to sign such receipts as the Spanish consul at London. He did sign them. The business was done at different times, and there were several conversations between the plaintiff and defendant; in one of which the defendant told the plaintiff, that if he was entitled to any fees, no difficulty would be made about paying them. The witness also stated that he himself requested the plaintiff several times to state what fees he meant to claim, and he would not.

On the cross examination he said, that the plaintiff produced to him the instructions of his Government, desiring him to do the business in question, and

that it was not till he had obtained those instructions that he would consent to

Amorr, C. J. I think the plaintiff must be called.

The Attorney General. It is true that he will not act when applied to without the authority of his Government, but he does the business for the defendants.

*ABBOTT, C. J. I am of opinion, upon this evidence, that he is acting in this business as the officer of his own Government.

The Attorney General. There are many cases where he acts as consul,

and yet receives fees.

ABBOTT, C. J. Where he acts between one individual and another, though he acts as consul, yet he may receive fees, but not where he acts for his Gov ernment. As well might the officers of the treasury here demand fees in the case of exchequer bills. The question is, for whom is the plaintiff acting? am of opinion he is acting for his Government.

The Attorney General, It is proved that the defendant said "If you are entitled to fees we will pay them."

ABBOTT, C. J. I am of opinion that he is not entitled.

The plaintiff was then nonsuited.

The Attorney General, Marryatt, and Platt, for the plaintiff.

Scarlett and Gurney, for the defendant.

[Attornies-Martindale and Freshfield & Co.]

GRAY, et al., v. COX, et al.

If a commodity having a fixed value, is sold for a particular purpose, and it turns out unfit, an action lies though there has been no warranty.

Tens was an action on the case by the plaintiffs, who were ship owners, to recover from the defendants, who were copper merchants, a compensation for *185] the loss *sustained in consequence of the defendants having sold them some copper for the sheathing of a West India vessel, which, after a

voyage to Demerara and back, turned out to be unfit for use.

It appeared from the evidence of the plaintiffs' witnesses, that the price paid for the copper in question was the usual price of that which is sold to be put on West India vessels. That at the time it was put on it had no appearance of defective copper, but after the return of the vessel from her first voyage to Demerara (during which she had not met with any accident,) the copper was found to be in a very bad state; that good copper usually lasts five or six years, but this was worn so much into holes, that the vessel could not safely undertake a second voyage without repair; and that the plaintiffs, in consequence, had her re-coppered.

Gurney for the defendants. The plaintiffs ought to be nonsuited. This action is brought on an implied warranty. It is not proved that there was any express warranty. This is not an action brought in deceit, but it is the case of sheets of copper furnished on an order, and used by the plaintiffs them-selves; they had, therefore, better means of knowing its nature than the defendants. When it was put on, it appeared to be perfectly good; but the witnesses say, that a larger portion than usual was afterwards found to be defective. The law implies no such warranty as must be established to support this action. If the quality of an article be known to one of the two parties and not to the other, then, indeed, the rule of caveat emptor does not apply, but the contrary

is the case where it might be known to both. The doctrine of a sound price implying a sound horse, has long been exploded. The defendants are not manufacturers, but merely merchants. He then cited the case of Parkinson & Lee, 2 East, 314, and afterwards continued—What is it we have sold? Sheets of copper. It is not pretended that they *were not sheets of copper. No defects were discoverable by the shipwrights when they put it on, much less could the merchants discover any. It appears, that some sheets of copper, after one voyage, have been sometimes found to be corroded, and here it becomes merely a question of quantity. This is the case of a latent defect, known to neither party; and I submit, that, under the circumstances, the plain tiff cannot possibly recover.

Campbell, on the same side.—The general rule of caveat emptor, is so well established, that, it is incumbent on the plaintiff to show an exception. There was a case decided in the Common Pleas, in which it was held, that if a person buys goods which are to be sent abroad, and which he has no means of previously inspecting, then there is an implied warranty that those goods are marketable. But the case here is very different. How can this case be dis tinguished from that of a person going into a shop and buying a pair of gloves, or a hat? or of a person buying a horse? Now, with respect to the quantity, if one sheet would not maintain the action, neither will a large number. Here is no express promise, and if there is any at all, it must be an implied one. It seems, there were a great number of defective sheets. The bill of parcels · is, in this case, the only evidence of a contract, and that shows merely, that copper was sold.

ABBOTT, C. J. I think, at present, it is not a case for a nonsuit. My direction to the jury will be, on the case as it now stands, (if Mr. Gurney can alter it by evidence he will,) that where a commodity having a fixed price or value, which distinguishes this from the case of the sale of a horse, which has no fixed value, where, I say, such commodity is sold for a particular purpose, it must be understood, that it is to be reasonably fit and proper for that purpose, and when I say reasonably fit and proper, I mean, that a few defective sheets

will not show that it is not fit and proper.

*Gurney then called the defendant's clerk, who proved, that they pur-chased the copper of the Mines Royal Copper Company; that they never had any complaint of their copper before; that the profit was but small,

and the delivery within three days after the receipt.

Scarlett, for the plaintiff, in reply. If the defendants stated to the Mines Royal Company, what the copper was for, they may have their remedy over against them. In reply to the argument about the warranty of horses, he contended, that if a horse is sold for a carriage, and it turns out to be a cavalry horse, and never to have been in a carriage at all, there is no need of a special warranty to enable the buyer to recover.

ABBOTT, C. J. The question is, whether this copper so sold by the defendants to the plaintiffs, was fit and proper, or, in the language of the declaration, serviceable copper, for unless it was so, the plaintiffs are entitled to a verdict. Though the defects could not be discovered on the first inspection, yet they must have proceeded from something wrong in the manufacture, and the merchant may have his remedy against the manufacturer.

Verdict for the plaintiffs.

Scarlett, and J. L. Adolphus, for the plaintiff. Gurney, and Campbell, for the defendant.

[Attornies—Evit and Swaine.]

DRABBLE v. DONNER.

If a defendant is served with a notice to produce letters four days before the trial, this is sufficient, though it is objected that he is a foreigner, and has only been in England since the time when the letters were received by him, and therefore he might have left them abroad.

Trover.—The defendant, in this case, was a foreigner, who came over to England, in August, 1823, and a notice to produce certain letters, was served on the 10th of April, 1824, the cause being tried on the 14th.

Scarlett submitted, that this was not sufficient, unless the plaintiff could show that these letters were in England with the defendant, when he came over in August, 1823.

The Attorney General contended, that it was quite sufficient, as the defend-

ant had been living with his family in England from that time.

ABBOTT, C. J. I think I must consider this as sufficient. If the contrary were holden, it would give rise to very great delay. A plaintiff might, in some cases, have to wait while a voyage was performed to the *East Indies* and back.

Scarlett. I admit the propriety of such a rule, where the party is domiciled

in England, and goes abroad for a time.

ABBOTT, C. J. I never knew this objection urged before.

The shipper of the goods was also allowed to prove the value, by stating the amount of duty which he paid upon them.

The case was afterwards referred.

*The Attorney General, and Comyn, for the plaintiff. Scarlett, and F. Pollock, for the defendant.

[Attornies-Williams, and Wadeson.]

MORRIS, et al. v. PATON.

If a defendant has signed a paper, in which he says, "I agree that my daughter shall perform, &c., this season, and I consent that she shall enter into articles for three following seasons," an action lies on the first part for the bare non-performance, but the latter part is a mere consent, and not an agreement.

This was an action by the plaintiffs, who were the proprietors of the Haymarket Theatre, against the defendant, the father of Miss Paton, the actress, to recover damages for the breach of the following agreement.

July 29th, 1822.

"I hereby agree, on behalf of my daugter, M. A. Patan, that she shall perform, during the remainder of this season, at 8l. a week, and I also consent, that she shall enter into articles with Mr. Morris, if he requires it, to perform for the three following seasons, &c., &c." Signed by the defendant.

For the plaintiff, it was proved, that Miss Paton performed during the remainder of the season of 1822, and also till the beginning of September, 1823, when she refused to perform any longer; and the house, in consequence, sustained a serious loss. It appeared, also, that the defendant once made as appointment to sign the articles, but did not keep it.

Scarlett, for the defendant, submitted that the plaintiff must be nonsuited, he not having shown that the daughter was willing to have signed. If this action were successful, a man who consented that his daughter should marry, would be liable to an action if she would not.

*Gurney, for the plaintiff, contended, that the words "I consent," [*190

were equivalent to "I agree."

ABBOTT, C. J. I am most clearly of opinion, that it is not a contract on the part of the defendant, that his daughter shall sign, but merely expresses his consent; and if she refuses, there is no remedy against him. He has bound himself, with respect to the first part, the performance in 1822, but not with respect to the signing of the articles.

Nonsuit

Gurney, and F. Pollock, for the plaintiffs. Scarlett, for the defendant.

[Attornies—Williams, and Chuter.]

GREENWAY, et al. v. FISHER, et al.

A factor having pledged goods to several persons, the factor is a competent witness in an action of trover against the parties having the goods. A packer, having, in the exercise of his business, shipped the goods, under the orders of a person who employed him for that purpose, is not guilty of a conversion.

TROVER for calico, which the plaintiffs had entrusted for sale to John and Henry Eccles, who had pledged it with the defendants for money lent.

Henry Eccles was called as a witness on the part of the plaintiffs.

The Attorney General, for the defendants, objected—This witness is interested in the event of the cause, for if the plaintiffs recover, he is quit from their demand.

ABBOTT, C. J. But not from the defendants.

The Attorney General. We are charged with being *all tort-feasers, and if so, we cannot call for contribution.

ABBOTT, C. J. If you put it in that shape, I shall hold that one tort-feater

may be a witness against another.

The Attorney General. This is to discharge him totally against the plaintiffs.

ABBOTT, C. J. I do not know that. We have always received this kind of evidence.

The witness was allowed to be examined.

It appeared, that one of the defendants, named *Woodward*, was a packer, who merely shipped the goods, and though he made affidavit at the Custom House, that he was the real owner, yet it appeared that it was the common practice for packers to do so, they considering themselves to have a special property in the goods at the time of shipment.

On his part, therefore, it was submitted, that he was not liable in an action of trover, inasmuch as he only acted in the regular discharge of his duty; and the work being done according to directions, no wrong in the transaction between other parties would affect him. If it were not so, every porter, and

every carrier, would be liable, as well as a packer.

For the plaintiff, it was replied—All persons who are parties to the conversion are liable. It is so in trespass. The question is, Whether Woodward is,

or is not, by law, a party to the conversion. If the goods still remain the property of the plaintiffs, the packer is liable. It is clear, that if a pipe of *192] wine were obtained by a person and *bottled off by his servant, and sent out, trover would lie against both. The case of Stephens v. Elwall, 4 M. & S. 259, was cited.

ABBOTT, C. J. On the part of Woodward, reliance is placed, and I think properly, on the circumstance of his acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and refusal, trover will lie; but while he is a mere conduit pipe in the ordinary course of trade, I think he is not liable.

The fact of a pledge to the other defendants was made out to the satisfaction of the jury.

Verdict for the plaintiffs against all except Woodward.

Scarlett, Brougham and Chitty, for the plaintiffs.

The Attorney General, Marryatt, E. Lawes, and Wilde, for the defendants.

[Attornies—Hurd & J., and Bolton.]

† This case decides that a servant acting under the order of his master, in detaining another's goods, is guilty of a conversion as well as his master.

*193] *SUTTON, Bart. v. The BANK OF ENGLAND.

If the Bank of England make unreasonable delay in the passing of a power of attorney to transfer stock, an action lies against them.

This was an action on the case, to recover the amount of a loss sustained by the plaintiff, in consequence of unreasonable delay in the passing of a power of attorney, for the transfer of stock at the Bank.

The case on the part of the plaintiff was as follows:-

The plaintiff having occasion to transfer some stock for the purchase of an estate in Norfolk, which he was to pay for on the 22d of October, executed a power of attorney to Mr. M. Dougall, his solicitor, for 62,000l., which was lodged on the 20th at the proper office in the Bank. The custom of the Bank being to keep powers of attorney for twenty-four hours only, on the 21st, about twelve o'clock, the broker who lodged it went to obtain it again, and was informed it was not ready. He went afterwards several times before half-past two o'clock, and was told it was under consideration in the director's parlor. Soon after one o'clock on the same day M. Dougall also went to the Bank, and saw the chief accountant, Dawes, and told him he was very anxious to get the money, on account of his being obliged to leave town according to a previous engagement, to complete the purchase of the estate, and required to know what was the cause of the delay. Dawes said he was not at liberty to state the reason why the power had not passed. M. Dougall then went away and returned a little before three o'clock, that being the latest hour at which a transfer could be made, and again demanded to know why the power was not passed. Dames then said that the directors were not satisfied with the genuineness of the signature of Sir R. Sutton, on account of a difference between it and the signature to a former power. M. Dougall said, if the directors had called him

before them he could have explained any apparent difficulty, by producing abundance of Sir R. Sutton's letters and checks on his London bankers, [*194] and would have referred to the bankers themselves. Dawes said he was sorry for it, but he could do nothing more, as the power was under consideration. M. Dougall then asked if it would be any satisfaction to the directors to see him, and Dawes replied that he did not think it would be of any use. M. Dougall went that evening into the country. The broker called every day between twelve and one, and it was not till the 25th that he was informed that the power was passed; a letter having been written to Sir R. Sutton, who acknowledged the authenticity of the signature. M. Dougall was an attorney of forty years standing, and was well known to the Bank solicitor, and had transferred stock under a former power from the plaintiff to the amount of 200,000l. One of the witnesses also to the power in question, was a witness to the former power.

On the part of the defendants it was proved, that it was the practice of the Bank, that when a power was in amount under 20,000l., it merely underwent the inspection of the head of the power of attorney office; but when it was of that amount or upwards, it was submitted in addition to the chief accountant, and afterwards to the directors. That it was the general practice in cases of doubt, to write to the party executing the power, and that in this case the plan of writing was adopted as the speediest course. That the power was passed

on the 24th, and the stock might have been transferred on that day.

It appeared that M Dougall was not in town on the 25th, when the broker knew of the passing of the power, and did not receive intimation of it till the 27th. The transfer was not made till the 29th; but there was no difference in

the price of stock between the 27th and 29th.

The Attorney General for the defendants, contended *that they were entitled to a verdict. Though the custom had been in ordinary cases to keep the power only twenty-four hours, yet where there had been any doubt, a longer time had always been taken. Great deliberation was requisite. The ordinary course, where the sum is large, is to apply to the party or the witnesses, and in this case the witnesses lived in the country as well as the principal. Similar cases had occurred many times before, and no notice had been taken of the delay, and no such claim in the present was ever thought of

being urged.

Scarlett for the plaintiff, in reply. The doubt should have been followed by an immediate inquiry of the party presenting the power. The directors should have sent for M-Dougall into their parlor. They have not only taken unreasonable time, but refused to adopt the most reasonable course. The broker says he called every day, and was not informed of the passing of the power till the 25th. The defendants say it was passed on the 24th. If the broker called on that day before the power passed, when it had passed they ought to have sent to him. A person is not bound to wait day after day, and hour after hour, neglecting his business, while the Bank are taking steps which are for their own security.

ABSOTT, C. J. The question is, whether there was an unreasonable delay in permitting M. Dougall, the attorney named in the power, to transfer the stock. As regards this question, the Bank of England, notwithstanding their high character, stand in no other situation than that of a private banker. If they suffer a transfer to take place under an invalid power, they must answer to the individual; therefore they should have proper time allowed them to ascertain its authenticity. The question is not so much whether, when a reasonable doubt arises, which cannot be cleared up in town, the Bank should be allowed to write into the country; but the question upon *this evidence is, whether there was reasonable ground of doubt, and if so, did they take reasonable means to have that doubt cleared up? M. Dougall. it seems, went to Dawes, who is the chief accountant. Dawes refused to acquaint him

with the difficulty. M Dougall remonstrated, as was natural for a person so circumstanced; but Dances still refused to tell him the nature of the objection. Now the question is, was it a fit and reasonable thing to withhold from M'Dougall this information, at a time when the difficulty might have been cleared up; and in deciding this, it will be proper to consider who M. Dougall is, for it is a very different thing, whether you are treating with a stranger or a perwe in a known character. It appears that he is an attorney of forty years standing; that he had acted under a former power, and was well known to the Bank solicitor. It is also a singular circumstance, that one of the witnesses to the power in question was also a witness to a former power, and therefore they had the opportunity of making a double comparison of signatures. If there was either no ground of doubt, or if there was, and the Bank did not take reasonable methods of getting it cleared up, the verdict should be for the plaintiff. And then will come the question as to the quantum of loss. It appears that M. Dougall told Dawes, that he was obliged to go into Norfolk, and that he did go, and did not return in time to receive the broker's note, which was written on the 25th. The Bank say the power was passed on the 24th. The broker says he inquired every day, and was not informed of it till the 25th. Now it is likely he inquired about half an hour before the passing, and the Bank might have sent their porter to call out his name in the Rotunda, or they might have written to M'Dougull, with whose residence they were acquainted, but they did not do either. His Lordship then left the question to the jury, who returned a verdict for the plaintiff.

Damages, 239. 10s. 6d.

*Scarlett, and Adolphus, Jr., for the plaintiff.

The Attorney General, Gurney, and Bosanquet, Serjt., for the defendant.

[Attornies-M. Dougall, and Freshfield.]

FULLER, et al. v. SMITH, et al.

If a banker of a supposed acceptor of a forged bill, discount it for the agent of one of the indorsers; on the discovery of the forgery the banker so discounting may recover back the money he paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his handwriting.

This was an action to recover the amount of a bill of exchange, which had been discounted by the plaintiffs for the defendants, and which afterwards turned out to be a forgery. The bill purported to be drawn by a person named Lunn, and accepted by George Norman & Son, payable at the plaintiffs', who were their bankers, and indorsed by Lunn and one Robert Simpson.

The forgery was clearly proved.

For the defendants, their clerk was examined; who swore that the defendants were the agents of Simpson, and had paid over the money to him before they had any notice of the forgery; on his cross-examination, he admitted that there was a running account between the defendants and Simpson, and entries in the books on both sides. These books were not produced.

The Attorney-General, for the defendants. The defendants in this case are entitled to a verdict. It appears, from the evidence of their witness, that they were only the agents of Simpson, and had paid over the money to him before they had notice of the forgery: and if an agent pays over money to his prin-

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cipal, he cannot be called on *to refund. In this case, also, it appears that the plaintiffs are the bankers of the acceptors, as well as the discounters of the bill; and bankers are bound to know the handwriting of their customers. If there was any negligence, it was on the part of the plaintiffs.

Scarlett, for the plaintiffs. I doubt whether Simpson was indebted to the defendants at all, because the books are not produced. But it makes no difference whether the defendants were acting as agents or not: the contract is with them, and there is a warranty on their part. It matters not, whether the subject of the action be a bill of exchange, or any thing else. Suppose a man sold another a hamper, as a hamper of wine, and it turned out to be a hamper of water; he could not, on being called on to return the money, say, "I sold it for a principal;—you must run after him." There is no defence to the action.

ABBOTT, C. J. The only question of fact in this case is, whether the defendants paid over the money to Simpson before they had notice of the forgery; but I am of opinion, in point of law, that they are liable, whether they did so or not. With respect to the argument, that the plaintiffs ought to have known the handwriting of the acceptors, I am of opinion, that a banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn, but not when discounting a bill; for his attention is not called to it then. My opinion therefore is, that the plaintiffs in this case are entitled to a verdict. His lordship then requested the jury to say, whether they were satisfied of the fact of the money having been paid over before notice of the forgery; and they stated that they were not satisfied.

Verdict for the plaintiff.

*Scarlett, and Goulburn, for the plaintiffs. The Attorney-General, for the defendants.

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[Attornies-Smith, and Alliston & H.]

See Smith v. Mercer, 6 Taunt. 76.

CLARK & CAPP.

To make a defendant's card evidence, you must give him notice to produce his cards, and put in one as a copy, unless the one to be put in can be proved to have been given to the witness by the defendant himself.

DEBT for a penalty, for acting as a broker in the city of London without being duly licensed.

To prove that the defendant acted as a broker, a witness produced one of the cards of the defendant and his partner—

"Capp & King, Ship's Brokers, &c."

ABBOTT, C. J. This card cannot be given in evidence, unless it was received from the defendant himself. The proper way is, to give the defendant notice to produce his cards; and then prove one as a copy, or give parol evidence of the contents.

Nonsuit.

• . . <u>. . .</u>

The Attorney-General, the Common Serjeant, Bolland, and Tindal, for the plaintiff.

Scarlett, for the defendant.

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In every case, where any written paper, at all bearing on the case, or the proofs to be addaced in support of it, is in the possession of the opposite party, it is always prudent to give him notice to produce it. If the paper is material, the plaintiff will be nonsuited if it be not produced; for unless he has given notice to produce it, he cannot give parolic evidence of its contents. Nay, further, if, in assumpsit, a plaintiff has made out a case on a quantum mermit, and one of his witnesses, in cross-examination, says that there is a written agreement on the subject, the plaintiff must put in that agreement, or be nonsuited; or if the defendant has it, and the plaintiff sattorney has not given the defendant notice to produce it, the plaintiff must be nonsuited. This, it may be said, is very clear; but it is surprising that so many causes are, almost every sittings, lost or compromised on bad terms, merely because parties think they may go on a quantum merely when there is a written agreement or undertaking, which perhaps they don't wish to go upon. It is also prudent to give a defendant, in actions for goods sold, notice to produce all invoices, bills of parcels, &cc. In short, if you give notice to produce too many papers, your counsel may still exercise his discretion whether he will call for their production or not; but if you have not given notice to produce them, you are shut out of the benefit of their contents, and very often monsuited for want of them.

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*M'GREGOR v. LOWE.

If several persons are jointly engaged in raising money for a bubble, one cannot maintain an action for money had and received, against another of them, for the money so raised.

Acron for money had and received. The defendant was employed by the plaintiff to act as agent for the receiving subscriptions for the *Poyais* loan. Scrip certificates were produced for 30,000*l*., which had been issued out by the defendant for a deposit of 15 per cent. on a loan of 200,000*l*.; and on these certificates the defendant, it was contended, had received money.

ABBOTT, C. J. (having read one of the certificates, which stated the loan to be for the use of the state of *Poyais*) said, there must be some evidence given, that at the time of this transaction there existed a state of *Poyais*; for if all these parties were actors in a bubble to raise money for a non-existent state, I am clearly of opinion *that one of them cannot maintain an action for money had and received against another.

A witness proved that a governor and lieutenant-governor of *Poyais* had been appointed by Sir *Gregor MacGregor*, but that no state of *Poyais* then existed.

ABSOTT, C. J. If there was no existing state of *Poyais* at the time of the loan, this action cannot be maintained.

Nonsuit.

The Common Sergeant, and F. Pollock, for the plaintiff. Scarlett, for the defendant.

[Attornies—Passmore and Swaine.]

REX v. TAGGART and BASKCOMB.

If two defendants are indicted for *jointly* making a corrupt contract with a third person, for procuring an *Bast India* cadetship, one of the defendants may be convicted, though the other is acquitted.

These defendants were indicted for having corruptly agreed, for 1001., to procure an East India cadetship for Frederick Bennet.

The case was very slight against Taggart, but strong against Baskcomb.

Scarlett, for Taggart, went for an acquittal on merits.

Denman, for Baskcomb, contended, that as the contract (though a corrupt one) was charged in the indictment as the joint contract of both the defendants, one of them could not be separately convicted.

*ABBOTT, C. J. I am of opinion, that if two parties are indicted jointly [*202

on a joint corrupt contract, each may be separately found guilty.

Verdict—Taggart, Not Guilty; Baskcomb, Guilty.

The Attorney General, Bosanquet, and Tindal, for the prosecution.

Scarlett, for Taggart.

The Common Serjeant, for Baskcomb.

[Attornies-Lawford and Subine.]

Two persons may be indicted for an offence arising from a joint corrupt contract, and each convicted separately, the same as they might if they were jointly indicted for an assault or a robbery: but if you state the corrupt contract to be joint, and it is necessary to prove what the contract was, and it is proved to be several, the defendants must be acquitted, on the ground of variance. It is best, if there is any doubt about what contract will be proved, to lay it in different ways in different counts.—In the following Trisity term, Baskcomb was sentenced to pay a fine of 2004.

BAIN v. MASON.

Adultery.—Convenient mode of proving the identity of the parties to the marriage.

This was an action for criminal conversation with the plaintiff's wife.

The proof of the marriage of the plaintiff and his wife, was an examined copy of the marriage register of one of the parishes at Liverpool; and the person who examined the copy with the original register, being acquainted with the handwriting of the plaintiff and of his wife, stated *that the signatures to the original registry which he saw at Liverpool, were of the handwriting of the plaintiff and his wife. This was the evidence of identity.

The fact of adultery was proved.

Verdict for the plaintiff.

Scarlett, Brougham, and Bernard, for the plaintiff. The Attorney General, and Wilde, for the defendant.

[Attornies—Slater and Freeman.]

In actions for adultery, it is not only necessary to prove an actual marriage, which is usually done by putting in the register book, or an examined copy, (though it may be done by the evidence of a person who was present at it,) but the identity of the parties must be also proved. In the case of Birt v. Barlow, 1 Doug. 173. Buller, J., points out a variety of ways of proving identity; such as, the wife being always called by her husband's surname after the date of the marriage; by the evidence of persons who partook of the wedding dinner, &c.: but the mode in the principal case seems to arrive at a more conclusive proof, and is often easier to be effected. In cases of adultery, it is not necessary to prove a license for the marriage, or a publication of banns. Nor is it at all necessary to call the subscribing witnesses to the entry in the marriage register, whether the register be produced or not. A book of Fleet marriages is not a register that can be produced in evidence: and it has been held that a copy of a register of a foreign chapel is not evidence of a marriage abroad. Leader v. Barry, 1 Esp. Rep. 353. And I apprehend, that the sertificate of marriage, that parties receive at Green, would be no evidence of a marriage. Indeed, a plaintiff would have the greatest difficulty in proving a marriage of that sort. If the marriage took place in a chapel, the plaintiff ought to give some proof

that it was a chapel in which marriages may be lawfully celebrated. How far a distinct admission of a marriage by the defendant, dispenses with the proof of it, has never been decided. In the case of Morris's Wife, 4 Burr. 2057, the defendant having said that the lady was "Captain Morris's wife," was considered insufficient; because, as is stated in B. N. P. 28, it was rather an admission that the lady passed as Captain Morris's wife, than that there had been an actual marriage, which was a fact not likely to be in the defendant's knowledge. In Trueman's case, 1 Ea. P. C. 470, the Judges considered that, in an indictment for bigamy, the admission of the prisoner was sufficient evidence of the first marriage. Of course, if a plaintiff can prove an actual marriage, he had better not rest his case on any admission, as it never has yet been done; but I can see no reason why a man may not admit that a person is another's wife, as well as any other fact against himself, and then the only question is, whether what the defendant has said amounts to an admission. Jews and Quakers being excepted out of the marriage acts, proof must be given of their marriages, according to their respective forms of worehip; and by the case of Ned v. Hers, I Camp. 61, it appears, that to prove a Jewish marriage, it is not sufficient to call persons who were present at the ceremony in the synagogue; as that is merely the acknowledgment of a previous written contract, which contract ought to be proved, as any other contract would be. I am not aware that any dispute has arisen on the proof of a marriage in a private room, in England, under the special license of the Archbishop; therefore, the marriage being prima facie void, it is incumbent on the plaintiff to bring his marriage within the exception. It should be observed, that very few of the cases on marriage, decided before the year 1754, are law now: because, before that time, any verbal contract for a marriage, if is verba de present, was, it seems, a valid marriage; as was any contract

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· *REVENGA v. MACINTOSH.

The defendant had taken the opinion of a special pleader, as to whether the plaintiff was liable for a debt; whose opinion was favorable to the defendant. The defendant caused the plaintiff to be arrested for it. In action for this arrest, charged to be malicious, the jury found for the plaintiff: and the Court above would not disturb the verdict.

Action for a malicious arrest. The plaintiff was the secretary for foreign affairs to the Colombian government, and the defendant an army accourrementmaker, who had contracted with that government, through their agent, a person named Mendez, for the supply of arms to the amount of 180,000l., for which he received debentures. The plaintiff happened to come to England, and the defendant applied to him to ratify the contract; but he refused, saying, that he had no authority from his government to do so. On the 3d of March, 1822, a letter was written to the plaintiff by the defendant's attorney, stating that, by the law of England, he was liable for the debt of his government, and threatening an arrest. In consequence of this, on the 4th, the plaintiff's attorney applied to the defendant's attorney to see the documents on which the liability of the plaintiff was supposed to arise; but the inspection was refused. The affidavit of debt was for 90,000l., and the bill of Middlesex for 180,000l., indorsed "Bail by affidavit for 90,000l. and upwards." The plaintiff was arrested about the 20th of March, and confined in a lock-up house for three or four days, and then removed to the King's Bench prison, where he remained till the 17th of May following, when he was discharged by consent of the defendant's attorney, on bail being put in by two gentlemen, who were not required to justify. Two rules were taken out for time to declare, and then a peremptory rule to declare. The defendant then declared for goods sold and money paid, and very soon after took out a rule to discontinue, and paid the costs, as taxed, in the month of December.

For the defendant it was proved, that the plaintiff corresponded with Mendez, and in some of his letters spoke of "our necessities;" but in others, it appeared that he wrote "by order of the President." It was proved also, that a case was laid before a special pleader by the defendant, as to the personal liability of the plaintiff, which was answered by an opinion in favor of such liability. And it was argued, that under these circumstances, the defendant was fully justified in commencing proceedings; inasmuch as they showed clearly, that he was not only not actuated by malice, but had also probable cause. The defendant was called on to produce one of the debentures, but refused.

*For the plaintiff it was urged in reply, that the defendant must have been influenced by an indirect motive; and that it appeared from the delay, and subsequent discontinuance, as well as the other circumstances of the case, that his object was, to force the plaintiff to ratify the contract, and

that the special pleader's opinion was obtained with that view.

ABBOTT, C. J., in summing up the case to the jury, observed, that if they thought the defendant acted bona fide on the opinion of the special pleader, they should find their verdict for him; but that if they thought he merely used the process of the law as a mean of compelling the plaintiff to come into his views, and did not believe at the time that he had really a right of action against him, then they should find their verdict for the plaintiff; and for such damages as they should think right.

The jury found a verdict for the plaintiff—

Damages, 250l.

Scarlett and F. Pollock, for the plaintiff.

The Attorney General, the Common Serjeant, Bingham, and Wilde, for the defendant.

[Attornies-Lavie and Hornby.]

On a motion for a new trial, in the following Term, the Court held, that the way in which the question was left to the jury, was correct; and refused to disturb the verdict.

*BARTON et al. v. BODDINGTON, Esq.

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If the vendor of tallows in the warehouses of the London Dock Company sell such tallows. and give an order addressed to the Compsny, by which they are directed "to weigh, deliver, transfer, or rehouse" the tallows to Mesrs. M. & B.; this order being received at the Docks, and M. & B. having sold the tallows, and received the money for them, the original vendor cannot stop them in the hands of the Company, though the tallows have not been weighed. It appearing that a weighing, if the sale takes place, (as this did,) soon after the importation, is not usually required; the weight on which the custom-house duties were paid in such case, being considered by the parties as correct and sufficient.

TROVER for tallow. This action was brought against the defendant as treasurer to the London Dock Company, under the following circumstances:

In the beginning of September, 1823, Mr. John Milford imported from St. Petersburgh, a quantity of yellow candle tallow, and on the 8th of that month

he sold one hundred casks of it to Messrs. Cattley & Esdaile, and delivered a transfer order in the following terms—

"London, 8th Sept. 1823.

" 22844.

"To the superintendants of the London Docks.—Please to deliver, weigh, transfer, or rehouse to Messrs. Cattleys & Esdaile, the undermentioned goods, perthe John, Ward, from St. Petersburgh."

Marks	New	
M	No.	
	1/100	One Hundred Casks Tallow.
	1	Jno. Milford.
3 0	Sep. 16/23.	A. 188.

In the margin of the order was written, "charges from the landing scale to

be paid by the buyers."

On the 9th of September, Messrs. Cattleys & Esdaile sold the one hundred casks of tallow to the plaintiffs, upon the same conditions on which they had purchased, and an indorsement was made on the transfer order in favor of the plaintiffs, who paid the purchase money and the charges according to contract; and the tallows were housed in their names at the docks.

On the 29th of September, the plaintiffs sold the tallows in question to Messrs. Moberley & Bell, and the *following is a copy of the contract delivered to them by the broker:

"London, 26th Sept. 1823.

"Sold for Messrs. W. & 1. Barton, to Messrs. Moberley & Bell, 100 casks of St. Petersburgh new 4 ustent of yellow candle tallow, at 41s. per cwt., to be paid for in cash with 2½ per cent. discount, draft 2 S. 1 cask tares, 12 per cwt., and 14 days to be allowed for delivery. In case of any dispute about the quantity, to be settled by arbitration.

"Wm. Ware Simpson,
"Sworn Broker."

Upon the contract being concluded, the plaintiffs delivered the following transfer order to Messrs. Moberley & Bell—

"London, Sept. 26th, 1823.

"To the superintendant of the London Docks.—Please to weigh, deliver, transfer, or rehouse to the order of Messrs. Moberley & Bell, the undermentioned goods, in the ship John, Captain Ward, from St. Petersburgh."



One Hundred Casks Y. C. Tallow.

1 c 100

W. & I. Barton."

Reca. Septr. 27/23. Transfer given Septr. 27/23.

A. 188.

H. W.

In the margin was written, "charges from the 10th October, to be paid by the buyer."

This order was delivered at the docks on the 97th of Neptember, and the

where consist marked on it there.

At the expiration of the prompt (houseon days,) vis. the 16th Colober, Money. Moherley & Mell gave the plaintiffs a check for 166th, on account of the tallows, which check, upon lating presented, was returned payment, on account of its being dated the 19th of Colober, as was then supposed, 1966 by mistake. On the tellowing day, the plaintiffs get another clock for 1860, which was likewise distanced, Mossis. Molecley & Itell having on that day suspended that payments.

On the same day that Mosses. Moberley & Hell purchased the fallows of the plateetts, they seld them again to Mosses. T. & H. Hawes, and independ to

them the plaintiffs' transfer miler.

It appeared that goods landed at the docks are weighed immediately by the King's efficer, and if they are sold at that time, they are toyofeed to the larger on the weights at the landing scale. But fallow being an article that diminishes by knepling, if a sale does not take place immediately, it is of course not essay to weigh it again before the precise quantity can be secretared, for which the purchases is bound to pay. But though the phrascology of the transfer constant the world to weigh," yet it was proved to be substant for tallows to be sold on 'Change, and for purchases to pay a some as most the proper some as possible, and to transfer them thank to be added in transfer to form and sold on the transfer them thanks to the transfer to the docks, and to transfer them thanks to be added to the tallows are taken sway from the docks, the recent of which appeared to be, that when they are weighed and not taken away a charge is made for reluming.

There was no weighing in the present case, except that at the landing scale, till long after the sale to the Messes. However, but it was proved that Messes. However, but it was proved that Messes. However longit to the money pand that the charges for the critical weighing, which neight to have been made out to the plaintiffs by the Dock Company, having by unistate been made out to Messes. However, they put them in the first instance, and sent the account to the plaintiffs, who discharged it; and that upon such account there was set them at 4d. for a transler, which according to the mage of traffs would be put in

to the plaintiffs of the sale to the Messes. Happen.

"On the 18th of October, 1846, at which time the tallows were still to the decks, the plaintiffs' sediction gave notice to the declaration not to deliver them to the order of Messis. However. The Dark Company did not enough with this notice, and in consequence the plaintiffs brought their section. The question was, whether or no it was necessary that there should be as

netical weighting, to transfer the goods legally tota the possession of the laryer.

The case of Hares v. Huland was offed,

I The ease of House and Others v. Wojsen and Others, is not yet in print. I have, however, been inversed with a 212 meteral it. It was an action of trover brought against the defendant, who was a whorthness, in the cover the value of trover brought against the defendant, who was a whorthness, it is encover the value of the house of ballow which in the defendant of allow which is the part ow! I have condend tallow were in the wavehouse of the defendance, my whom Alabertay for the fact of the fact of the defendance of the defendance of the defendance of the date of Reptendar 8. The defendance of encoving the total region appeal to tallow that the plaintiffs name in their backs, for which they were paid 82. I and also delivered two day one condend the fact before Alabertay of test stoped payment, and the the hold orded. On the tallow, therefore the plaintiffs had sold the delivert of a At the trail, a wealth was found for the plaintiffs, and in Alderty I can deliver to ap. At the trail, a wealth was found for the plaintiffs, and in Alderty I can deliver to ap. At the trail, a wealth was found for the plaintiffs, and in Alderty I can deliver to be Attained to the trail, a wealth of the first whore grown that it had been declided in the conduct of the sold and assented to the delivery order, and when present by the Court, that the defendance back assented to the delivery order, he contended, that the conduct of the defendance back assented to the delivery order, he contended, that the conduct of the defendance had assented to the delivery order, he contended, that the conduct of the defendance had assented to the delivery order, and except the contended the first delivery order, and entered to be the delivery order, and entered to be the first of the defendance tool that the delivery order, and therefore the conduct of the defendance order to be the order of the defendance order. The delivery order, and therefore the the delivery order, and the order of the defendance order of the delivery order, and the order of th

Assert, C. J., after hearing the observations of counsel, in the course of which it was agreed to raise the question by a bill of exceptions; with a view to such a course of proceeding, gave his direction as follows—"On the evidence, I am of opinion, that an actual weighing was not necessary for the delivery, and shough the first seller has not been paid, yet, as the subsequent buyer has tone fide paid the person he bought of, the first seller cannot call on the Deck Company to deliver the goods to him. The verdict therefore should be for the defendant."

Verdict for the defendant, subject to a bill of exceptions. The Attorney General, Tindal, and Wilde, for the plaintiffs. Scarlett, Bosonquet, Serju, and Carter, for the defendant.

[Attornice-Pearce and Tecodale.]

vander of guads to a wharfinger, to deliver goods to the vendee, does not pass the property. If any thing (such as weighing) remains to be done. From the eases of Lorenger v. Zamada, 7 Taunt. 265, and Lucas v. Dorrien, 7 Taunt. 278, it seems that the mre substreament of a West India Dack warrant passes the property; and in the latter z is laid down, that if an order is delivered to a wharfinger, by which the vender decree has to deliver goods to the vendee, and he assents to it, the property passes, though no transfer has been made in his books. An indorsement of a bill of lading for valuable consideration, and without the indorsees having notice of any thing which would make the hell of lading not fairly assignable, will pass the property of the goods so as to prevent a suppage in transacts.

*CURTEIS et al. v. WILLES.

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I a rather absents himself from any place to avoid a creditor; it is an act of bankruptey.

across against the sheriff for a false return of stulla bone to an execution result against a man named Crutchley. The defence was, that Crutchley had remained an act of bankruptcy previous to the time when the execution mand.

"It appeared that Crutchley lived in Warwickshire, and was in the habs, when he came to town, of calling on a person named Corbet, for its purpose of purchasing goods; that on one occasion before the execution he was at Corbet's house, and eaid to one of Corbet's clerks, that he owed money is a man named Johnson, who he understood lived in the neighborhood, and its should not like to see him, because he expected he would bother him for instrument. The clerk replied that Johnson was very likely to call there that cave upon which Crutchley said that he would go away directly; but while he was speaking, he saw Johnson coming, and immediately went down into a source warehouse, where he remained till Johnson was gone. Crutchley was see as the habit of seeing any one on business at Corbet's, but merely went these for the purpose of looking out goods.

For the phase of the contended, that this was not a valid set of bankvalues: because the absenting ought to be either from the dwelling house, or from the redmary place of business, or to avoid a sheriff's officer, or from the damping of an appointment.

Account, C. J. I can of opinion, that a man who absents himself from entry passer as which he knows has exoluter is coming, in order to avoid him, and to Wen. XII.—17 prevent, as he calls it, his bothering him for money, commits an act of bankruptcy.

Verdict for the defendant.

The Attorney General and Wilde, for the plaintiffs. Scarlett, for the defendant.

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[Attornies, Dawes and Hertslet.]

In Easter Term the Attorney General moved to set aside the verdict on the grounds he stated at the trial; *and added, that the reason why he contended that a man's absenting himself from a place which was neither his place of residence nor business, could not be an act of bankruptcy, was this, that he was not supposed at such a place to be in possession of money to discharge the debt.

ABBOTT, C. J., observed, that although he might not have the money about him, yet he might promise to make arrangements. He might say, "I will pay you to-morrow," or something of that sort.

The Court, after citing the case of Bayley and Scofield, 1 M. & S. 338, refused the application.

CAMBRIDGE v. ANDERDON.

If a ship is so injured by perils of the seas, that she is rendered wholly unfit for sea, and cannot be repaired but at a greater expense than building a new ship, the owner may recover for a total loss, though the ship, in the state she is reduced to, is sold with her registry.

This was an action on a policy of insurance on the ship Commerce, at and from Quebec to Bristol. The plaintiff claimed as for a total loss. The facts of the case were these:

The vessel sailed from Quebec on the 8th of July, 1823; the pilot left at the usual place, about 150 miles off; she proceeded down the river Saint Lawrence, and about half past eight on the morning of the 13th of July, during the continuance of a thick fog, which commenced on the preceding morning, she struck on a ragged shore, about two hundred fathoms from the land. The captain tried many ways to get her off, but did not succeed. He landed as soon as he was able, which was about twenty-four hours after she struck, and found they were about two hundred and twenty miles from Quebec. He had a conference with all his officers, and the general conviction was, that it would *cost less to build a new ship than to make the one in question sea-worthy. A considerable quantity of timber, forming the chief part of the cargo, saved the ship from going to pieces. The captain went to Quebec, and saw the surveyor for Lloyd's, and agreed with him on the names of three surveyors, who were to inspect the ship. He afterwards, acting on their judgment, sold the ship and cargo. She was sold with her register. The purchasers were shipwrights, who did some repairs to her, and sent her on another voyage, in the prosecution of which she was lost. The captain, the mate, and the ship's carpenter proved that they saw her after the repairs were done, and did not think her fit to undertake a voyage, and that they would not have trusted their lives in her.

For the defendant it was argued, that the plaintiff could not recover as for a total loss; for the ship was not sold as a wreck, to be broken up, but was sold with her register, to make another voyage; and it was clear, from the circumstance of her being purchased by shipwrights, and repaired, that she must have existed as a ship; and if a vessel exists in specie, and can by any repairs

be made fit for sailing, it is not a total loss.

ARROTT, C. J. The question in this case is, whether this is a total or a partial loss; and I think, in considering that question, we should look, not so much at the acts of the parties, either buyers or sellers, as at the accounts they give of the state of the ship itself. The circumstance of selling with the register is in general against a total loss; but it is the act of the master, and ought not to be decisive. If on the evidence the jury think that she was utterly useless as a ship, after she struck, and never could be made useful, but at an expense equal to her value; then I am of opinion, in point of law, that it is a total loss, with benefit of salvage, though the form of a ship remained.

*The jury found a verdict for the plaintiff as for a total loss. Scarlett, Marryatt, and Platt, for the plaintiff.

The Attorney General, F. Pollock, and Holt, for the defendant.

[Attornies—Rivington, and Reardon & D.]

In Easter term the Attorney General moved for a new trial, on the ground that an abandonment was necessary; but the Court refused his application, Mr. Justice Bayley saying, (the rest of the Court concurring,) I take the legal principle to be, that if by any perils within the policy the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment. This appears from the case of *Idle* v. The Royal Exchange Assurance Company, 3 J. B. Moore, 115. But as it seems a writ of error was brought in that case, and we do not exactly know what was the final result, I do not much rely upon it. There is, however, another case in 6 J. B. Moore, in which it was held, that if a sale be justifiable, the assured may recover as for a total loss. And though Mr. Justice Richardson is said to have differed from the other Judges; yet it was not upon the general principle, but upon the peculiar facts. All he doubted about was, whether the sale was justifiable. It appears to me that the sale in the case before us was a justifiable sale. All the witnesses agree that a new ship might have been built for less than it would have cost to put the one in question into a serviceable state. I am of *opinion that the plaintiff is entitled to recover as for a total loss, because that which was sold did not exist as a ship at the time of the sale.

[†] Read v. Bonham, 6 Moore, 397, where the Court held, that where the captain sold the ship, because he could not get her repaired, the jury might find for a total loss.

ADJOURNED SITTINGS AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE ABBOTT

MURLEY et al. v. LANGRICK.

A person is a competent witness for the plaintiff in an action for goods sold, though he is to receive a commission on the sale.

Acrion for goods sold. In this case the evidence of a witness, who had been examined upon interrogatories, was read on the part of the plaintiff. The deposition stated, that he was to receive a commission upon the sale.

The defendant's counsel submitted, that this must prevent the evidence being read, as it showed the party giving it was not a competent witness.

ABBOTT, C. J., inquired if the evidence stated that the commission was not to be received unless the money was paid; and being answered in the negative, held that the witness was competent.

Scarlett, and Chitty, for the plaintiff.

F. Pollock, for the defendant.

[Attornies—Patten, and Swaine & Co.]

*GARRETT v. HANDLEY.

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In an action on a guarantee, undertaking to "make provision for the repayment" of a sum lent to a third person, the plaintiff must give some proof that no provision has been made by the defendant, or he will be nonsuited. Slight proof is, however, sufficient.

Acrion on a guarantee in the following terms:

February 12, 1818.

"John Garrett, Esq.

"I understand from Mr. Gibbons, that you have consented to advance him 550l. I undertake to make provision for the repayment of the same, under the arrangement now going on for settling Mr. Gibbons' affairs."

Signed by the defendant.

The defendant was Gibbons' attorney. The guarantee was proved, and also the advance of the money to Gibbons.

ABBOTT, C. J. The plaintiff must give some evidence that no provision was made for the repayment; for this was not a promise by the defendant to pay, but only to make provision under the arrangement. Non constat but he did so.

The Attorney General. It is impossible for the plaintiff to procure such evidence.

ABSOTT, C. J. I know you need not give strong proof, but some evidence is necessary. As that you asked him what he had done; and his answer, that he had not made provision: or something of that sort. If no such evidence is given, the plaintiff must be called.

Nonsuit.

*218] *The Attorney General and Richards for the plaintiff.

Jervis and Tindal for the defendants.

[Attornies-Platt, and Handley.]

In the ensuing Easter Term, Richards moved for a rule nisi for a new trial, which was granted.

By the statute 29 Car. 2, c. 3, § 4, No action shall be brought on any promise to answer for the debt, default, or miscarriage of another, except it be in writing, and signed by the party to be charged therewith, or by some person by him authorized. But all guarantees must not only be in writing, and signed, but must be founded on a sufficient consideration: and by the case of Wain v. Warlters. 5 Ea. 10, confirmed by the case of Saunders v. Wakefield, 4 B. & A. 595, the consideration must be stated in writing, as well as the promise. A plaintiff need not declare on a guarantee as in writing; if he put in the writing at the trial it will be sufficient, and if the defendant pleads a tender, it does away the necessity of this proof; for, by a tender, the defendant admits the cause of action. Peake's Rep. 15.

DOE, on the Demise of SMITH, v. CARTWRIGHT.

On an ejectment for a house, the land-tax assessment of the parish in which the collector of taxes charges himself with the receipt of money from A. B. as tenant of a particular house, is evidence that A. B. was tenant at that time. The books of an insurance company, in which they charge themselves with the receipt of a sum of money, as a premium to insure a particular house, in the occupation of A. B., from fire, are, also, evidence of his occupation. These entries are evidence, because the party making them charges himself with the receipt of money.

EJECTMENT for a house in St. Anne's Lane, in the parish of St. John the Evangelist, Westminster.

George Fitzwater Hook died, seized of four houses in St. Anne's Lane, and by his will, dated 1777, devised one of the houses, which he described in his will, as "late in the possession of John Young," to the plaintiff's father, and devised the other three to a person whom the defendant represented; the defendant had had possession of all four for some years, and the difficulty now was, to say which house was "late in the possession of John Young."

To show that it was the third house from Peter Street, the land-tax assessment for the year 1771, was put in; it stated Young to be the occupier.

Curwood objected, that this was not evidence of who was occupier.

ABBOTT, C. J. It appears, by the assessment, that the sum charged is paid, therefore the collector charges himself with having received the sum mentioned from John Young. It is, therefore, evidence.

The plaintiff's counsel next put in the books of the Westminster Insurance Company, to show that this house was in the occupation of Young, and as such was insured by that office.

The entry in question stated, that George Fitzwater Hook had paid the Company 11. 4s. as a premium to insure a house in the occupation of John Young, being the third house from Peter Street.

Curwood objected, that this was a mere entry in the private book of a third

party, and therefore not evidence.

Abbott, C. J. The company charge themselves with the receipt of 1l. 4s. premium, therefore it is evidence, on the same principle as a steward's book.

Verdict for the plaintiff.

*Marryatt, and Chitty, for the plaintiff. Curwood, for the defendant.

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[Attornies-Dodd, and Stephenson.]

RODWELL et al. v. REDGE.

In an action against a performer for not performing at a licensed theatre, pursuant to his contract, evidence that the performances have gone on without interruption, is sufficient prima facie evidence that the theatre is duly licensed.

THE plaintiffs were the proprietors of the Adelphi Theatre, and the defendant an actor, commonly known as Signor Paulo. The action was for a breach of the following agreement.

"June 6th, 1823.

"I, Paul Redge, do hereby agree to perform at the Adelphi Theatre for the two ensuing seasons, (stating the respective commencements and terminations,) at 3l. a week, subject to the usual terms.

(Signed,)

"Paul Redge."

The said Paul Redge to be entitled to introduce 25l. worth of benefit tickets on one night in each season, to be named by the manager.

(Signed,) "J. T. Rodwell."

It was proved, that the defendant had notice to attend at the commencement of the season, and refused, and that there were performances in which he was very much wanted, being a favorite with the public.

For the defendant, two objections were made. 1st. That the plaintiffs were stated in the declaration to be the proprietors of a licensed theatre, and the license had not *been proved; and 2dly, that the contract appeared to be made with one of the plaintiffs only.

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ABBOTT, C. J. I shall presume the license from the fact that the performances went on. If it were not so, they would all be rogues and vagabonds.†

In reply to the second objection, it was urged, on the part of the plaintiffs,

† It seems to be no part of the case to be made out on the part of the plaintiff, that the theatre was licensed; the whole the plaintiff had to prove, was, the contract, and the breach of it. If the theatre was not licensed, that was matter of defence to excuse the breach of the agreement; and therefore, if it had not been a licensed theatre, it lay on the defendant to show it as his defence: you might just as well, in an action for not accepting goods sold, which were foreign produce, (such as brandies and the like,) call on the plaintiff to prove that the brandies had paid the Custom-House duties: for that, if they had not paid the duties, the contract for the sale of them was illegal. In the case of Gallani v. Laboret, 5 T. R. 244, where it appeared that the theatre was not licensed, the Court held, that no action could be maintained for the defendant's not performing there in pursuance of his contract.

that the case of Skinner and Stocks, 4 B. & A. 437, was in point, and deci

sive against it.†

ARBOTT, C. J., assented, and the jury found a verdict for the plaintiffs, damages 40s., his lordship observing, that it was important for the public to know. that these were engagements which ought to be performed.

Scarlett and Chitty for the plaintiffs.

Marryatt, for the defendant.

[Attornies—Richardson, and Rogers & Son.]

† The case of Skinner and Others v. Stocks, 4 B. & A. 437, decides, that if a party makes a contract with one of two or more partners, not knowing that there are other partners; either the partner who actually makes the contrac, or the whole of the partners, may sue such parw for breach of the contract.

*222] *COURT OF COMMON PLEAS.

SITTINGS AFTER HILARY TERM, 1824.

BEFORE LORD GIFFORD, C. J.

HAWKINS v. HOWARD & GIBBS.

In an action against annuity brokers (who have become bankrupt) for laying out the money of the plaintiff on bad security, the solicitor under their commission is compelled to produce their books, under a subparas duess tecum. And an entry in their ledger is evidence, though the witness who produces it did not make the entry; and the solicitor under their commission is compelled to produce the ledger containing the account between them and the person to whom they advanced the money, to show that they knew him to be in an insolvent state.

THE declaration in this case stated that the defendants received two sums of money from the plaintiff; one a sum of 3000l., the other a sum of 1200l., which they undertook to lay out for him in the purchase of life annuities, on good security; but that they laid out the money in the purchase of two annuities granted by George, Marquis of Blandford, (since Duke of Marlborough,) on his personal security only, and that the annuities had not been paid; and thereby the principal sums of money were totally lost. Plea-The general

In support of this case, the solicitor to the assignees under the commission of bankrupt, which had issued against Howard & Gibbs, (who were annuity

brokers,) was subposnaed to produce the books of Howard & Gibbs.

Wilde, as counsel for the assignees, contended, that the books ought not to be produced, as the estate might be prejudiced: for that here it was contended that Howard & Gibbs had misapplied the plaintiff's money; if so, it was money had and received, and proveable under the commission.

Lord GIFFORD, C. J. The books must be produced: *as the entries affect the very money in question in this transaction, the plaintiff is

entitled to have them produced.

A witness then produced the books. One of them was a ledger of *Howard & Gibbs*. The witness stated, that he had never made any entries in it; but it was copied from the day-book.

Lord GIFFORD, C. J. This being the ledger of Howard & Gibbs, the

entries in it are evidence against them.

The plaintiff's counsel wished to turn to the Marquis of Blandford's

Vaughan, Serjt., contended, that the Marquis of Blandford's account with Howard & Gibbs was not evidence.

Lord GIFFORD, C. J. It is evidence; because the plaintiff alleges that the

money was lost by being advanced to the *Marquis* for annuities.

The entry was read. It gave the *Marquis* credit for these sums; but he

was not debited for the payment of these annuities.

The deeds, granting both these annuities, were proved, and read; and examined copies of judgments, to the amount of 300,000l., against the Marquis, were also put in.

Lord Gifford, C. J., ruled, that there was no evidence that the annuities were not regularly paid, or that the money was not well laid out; for, as to the judgments, the *Marquis* might have property to a much larger amount.

*Bosanquet and Cross, Serjts., and Evans, for the plaintiff.

Vaughan and Pell, Serjts., for the defendants.

[Attornies-Long and Gibbs.]

BEFORE BYST, C J, PARK, AND BURR DUGH, JS.

In Banc.

Rosanquet, Serjt., now moved for a new trial, on the ground that there was evidence to go to the jury, that the defendants had neglected their duty towards the plaintiff, and that the annuities were of no value.

The Court granted a rule to show cause.

This rule, however, never came on to be argued.

JOHN LENS, Esq., Serjeant at Law, v. BROWN et al.

Rateability of Serjeant's Inn, Chancery Lane.

This was an action of trespass against the defendants (who were overseers of the poor of the parish of Saint Dunstan in the West,) for taking the plaintiff's goods. Plea—The general issue.†

[†] By statute 21 Jac. 1, c. 12, churchwardens, and other parish officers, may plead the general issue, and give special matter in evidence; and the jury must find for the defendant, if the plaintiff omits to prove that the fact occurred in the county where the venue is laid: and if the defendant obtains a verdict, or the plaintiff be nonsuited, the defendant is entitled to double costs. And churchwardens and overseers, acting under a justice's war

The real question in this case was, whether the chambers of the Judges and Serjeants, in Serjeant's Inn, Chancery Lane, were situate within the parish of St. Dunstan, and therefore liable to contribute to the poor's rate of

that parish.

Admissions, signed by the attornies, were put in. By these the parties consented to admit that the defendants took the plaintiff's goods; that the defendants were duly appointed overseers of the poor of St. Dunstan's, and were so at the time of the taking; that the plaintiff occupied the chambers, No. 1, Serjeant's Inn., and was assessed to the relief of the poor of the parish of St. Dienstan, in respect thereof, at the sum of 111. 10s.; and that for that sum the present distress was taken.

To prove Serjeant's Inn out of the parish of St. Dunstan, the plaintiff's counsel put in an ordinance of the Parliament of the year 1646. It was read from Scobell's Collection (a printed book.) Chapter 18th ordained that the lands of all the bishops should be sold; but this ordinance was not to extend to Serjeant's Inn, where the Judges resided, which was stated to belong to the *bishopric of Ely: this the Judges were to have as before; but it was. to be at the disposal of the Parliament after the then lease was expired.

An examined extract from the parliamentary survey of 1650, (preserved in Lambeth Palace,) was put in. It described the then state of the living of St.

Dunstan's; but did not at all mention Serjeant's Inn.

The land-tax act, 4 W. & M. c. 1, s. 33, was read. It enacted, that in all privileged and other places, whether extra-parochial or nor, assessors should be appointed, although, in any monthly or other tax, such places had not been before charged; and such assessors should make assessments under this act, in like manner as in any parish, tithing, or place.

Mr. Herolet produced examined copies of the duplicate land-tax assessments for the year 1693, of the parish of St. Dunstan in the West, and of Serjeant's

Inn; they were separately assessed.

The defendants' counsel admitted that the land-tax was still assessed and collected in the same way, and that there were separate assessors and collectors

of the land-tax for Serjeant's Inn.

The statute 1 Geo. 4, c. 59, was put in. It was a private act for uniting the rectory and vicarage of St. Dunstan's. In a schedule to the act, every house in the parish of St. Dunstan was enumerated. None of the chambers of Serjeant's Inn were included in the enumeration; but the Serjeant's Inn coffeehouse, which is a part of Serjeant's Inn, was named in the schedule as being in the parish of St. Dunstan.

Notice had been given to the defendants to produce the vestry-book of the

30th of November, 1743.

*They produced it; and from it an order of vestry was read. It stated that a child had been dropped in Serjeant's Inn; and it ordered that the overseer should not provide for it, as the parish had nothing to do with the poor of Serjeant's Inn, and as the Inn paid no poor rates to the parish.

rant of distress to levy a poor's rate, are within the protection of the stat. 24 Geo. 2, c. 44, as to demand of perusal and copy of any warrant, and also as to the action being commenced within six months, &cc. In order that an overseer or other officer may obtain double costs, it is necessary for his attorney to get a certificate from the Judge who tried the cause, that the defendant was acting in the execution of his office; but this certificate need not be granted at the time of the trial. Harper v. Carr, 7 T. R. 448. But it is more prudent to get the certificate while the case is in the Judge's recollection. It should be observed that this applies only to actions of treapses brought against observed when be observed, that this applies only to actions of trespass brought against churchwardens and overseers, and not to replevins. Churchwardens and overseers are not entitled to notice of action, as magistrates and revenue officers are. See the notes on the case of

Long v. Edwards, ante (p. 40.)

† Examined copies of the land-tax assessments, from the laying on of the land-tax in the reign of William the Third, may be obtained at the Lord Treasurer's Remembrancer's

office, in Somerset House. Vol. XII.—18

Mr. Hewlet put in a receipt for the maintenance of the child, dated 26th of January, 1743. It was signed by the nurse, and acknowledged the receipt of the sum from Serjeant Skinner, for nursing Mary Basket. (The child was so called, from being left in a basket.) He also put in a receipt from the parish clerk of St. Dunstan's, for the burial fees of Miss Mary Basket, also from Serjeant Skinner. He also put in receipts from the reader and clerk of the chapel of Serjeant's Inn, for their salaries.

The defendants' counsel admitted that there was a chapel in Serjeant's Inn, and that there had been service there, which had been paid for by the scr-

jeants.

Receipts to the serjeants, for the maintenance of a woman sent to Bedlam from the Inn, and also for the maintenance of a pauper belonging to the Inn, were also put in, and it was proved by witnesses, that there was a parish boundary plate at each end of the Inn; that funerals from Serjeant's Inn paid double fees, as non-parishioners; that there were no pews for the serjeants in St. Dunstan's church; and that the serjeants kept the gates shut, so that the Inn never was perambulated by the parish.

From the cross-examination it appeared, that the chambers of Mr. Baron Graham, and Mr. Baron Garrow, were over the Serjeant's Inn coffee-house.

For the defendants. The vestry clerk produced the parish books. From these it appeared that the parish had annually received from the younger judge of the Common Pleas, since the year 1615, an annual pension of *21.

13s. 4d. (i. e. 13s. 4d. per term:) in some of the entries it was stated to be "for the poor." This payment is still regularly made.

He also produced a book called the *Doomsday* book: from it an entry was read, dated 1650. It was "account of money received of the *parishioners*, for providing buckets against fire." To this the judges contributed 6s.

From a book called the *Churchwarden's Ledger* was read a series of entries, which commenced "Receipts for licenses for eating flesh in *Lent*, and on other days, prohibited to the use of the poor,"† and contained entries of 6s. 8d., paid by Sir *Julius Cæsar*, Master of the Rolls, Mr. Justice *Croke*, and Mr. Serjeant *Glanville*, for licenses to eat flesh.

A book called the assessment book was put in. In it the landlords and inhabitants were charged for a monthly aid to the Lord Protector. Under title "Chancery Lane," Serjeant's Inn was mentioned in the column of landlords;

but no one was inserted as tenant. This was dated 1657.

*In the rate on the parish of St. Dunstan, for a poll tax, in 1677,

Serjeant's Inn was charged.

From the churchwarden's account book were read, entries of sums paid for underpinning the Chief Justice's pew, and for cushions for the judges' pews.

A witness produced examined copies of several indictments tried at the Old Bailey, in which Serjeant's Inn was described as in the parish of St. Dunstan. They were all for perjury, except one, which was for petty larceny.

† These licenses for eating flesh were granted under the stat. 5 Eliz. c. 5, which was an act for maintaining and increasing the navy. By that statute it was enacted, that every person eating flesh on a Wednesday, or other fish day, should forfeit three pounds, or suffer three months' imprisonment. But these penalties were not to extend to persons licensed; and for a license lords of Parliament and their wives were to pay 26s. 8d.; knights and their wives 13s. 4d.; other persons 6s. 8d. to the poor's box of their parish; and persons sick were to be licensed by the rector, vicar, or curate of their parish, and if there was none, by the curate of the adjoining parish; but no license was to extend to the eating of beef: and any person preaching, writing, or saying, that eating fish is of any necessity to the saving the soul of man, should be punished as a spreader of false news. This may seem rather a singular method of manning the British navy; but I take this apparently absurd act to have been passed, because the sudden abolition of satigre days by the change of religion, must have nearly ruined the fishermen, and therefore it was feared that they would join the Catholic party in disturbing the Government, as a Catholic Government would be more favorable to their vocation.

1 These indictments proved nothing heavens province and not the laid.

these indictments proved nothing, because perjury and petty larceny need not be laid in the parish in which they were committed, as burglary, stealing in a dwelling house,

&c., must.

Witnesses proved that they had known rates constantly paid by the occupier of the Serjeant's Inn coffee-house, and it was agreed that that was a part of

Serjeant's Inn.

Lord GIFFORD, C. J., told the jury, that the private act of 1 G. 4, c. 59, deserved great attention, because it enumerated every house in the parish in a schedule, and this Inn was certainly not included. However, the coffee-house, which is a part of the Inn, was included. It might be said that the Inn, being the property of the see of Ely, was exempt from tithes, as the property of Bishops often is. However, the schedule professed to enumerate every house in the parish. The conduct of the parish relative to the bastard child was very strong, for they expressly denied that they had any thing to do with the lnn; and the paying double burial fees was also worth attention; and these circumstances were much strengthened by the non-payment of rates for two centuries. As to the boundary plates at each end of the Inn, why need any be put up, if the whole place was, as it was contended to be, within the parish, and no boundary was there. The inference was, that at one boundary mark the parish of St. Dunstan ended, and at the other the parish began *again, leaving Serjeant's Inn out of the parish. For the defence, the payment of 21. 13s. 4d. from the junior judge is proved; that seemed to be a mere personal due, and not to be paid in respect of any building. The entry respecting fire ladders, it is said, may apply to Serjeant's Inn, Fleet Street, and that may be so. The licenses to eat flesh must be obtained from the clergyman of the parish where the party dwelt. But there was nothing to limit the residence to Serjeant's Inn. The assessment of 1657 did not appear to have been paid. and therefore was of no weight. His Lordship left the case to the jury.

Verdict for the defendants. Vaughan, Serjt., and Tindal, for the plaintiff.

Pell, and Taddy, Serjis., and Curwood, for the defendant.

[Attornies-Hewlet, and Morshed.]

ADJOURNED SITTINGS IN LONDON.

BEFORE LORD CHIEF JUSTICE GIFFORD.

POCOCK v. BILLING.

In an action on a bill of exchange, by indorsee against acceptor, the declarations of a former bolder of the bill are evidence, if it can be shown that at that time he was holder of the bill, and was making such declarations to his own prejudice, and against his own interest.

ACTION for a bill of exchange, brought by the indorsee against the acceptor. It appeared that there had been several indorsements. The defence was, that there was no consideration for the bill, or the indorsements, and that the whole transaction was fraudulent; and, to *show this, the defendant wished to give in evidence a conversation between a person named Pywell, who

was one of the indorsers, and the witness, in which he stated, that he gave no

consideration for the bill, and received no money for his indorsement.

This being objected to, on the ground that a statement of *Pywell*, when the plaintiff was not present, was no evidence, and that, in an action by indorsee against acceptor, what the indorser said could not be evidence against the indorsee.

Waughan, Serjt., argued that as the present plaintiff, as indorsee, claimed

through Pywell, what Pywell said was evidence against him.

Bosanquet, Serjt., on the same side, contended, that though this might be no evidence that the plaintiff gave no consideration, yet it was evidence that Pywell neither gave nor received any.

Lord GIFFORD, C. J. I think that the declaration of Pywell is admissible,

to prove that he gave no consideration for the bill.

The evidence was then received, and the jury, on this, and a good deal of other evidence, found a

Verdict for the defendant.

Pell, Serjt., and Broderick, for the plaintiff. Vaughan, and Bosanquet, Serjts., for the defendant.

[Attornies-Robinson & H., and Orlebur.]

BEFORE BEST, C. J., PARK, AND BURROUGH, JS.

In Banc.

Pell, Serjt., having, in Easter Term, obtained a rule to *show cause why there should not be a new trial in this case; it was now argued by Vaughan and Bosanquet, Serjts., for the defendant, and by Pell and Wilde, Serjts., for the plaintiff.

BEST, C. J., in directing the rule to be made absolute, said—The question is, whether the declarations of a former holder of a bill of exchange are evidence of the want of consideration. I take it, that the declarations of the holder of the bill, made while he has the bill in his hands, are evidence; because at the time he speaks he is destroying his own rights; but if such person parts with the bill to-day, and to-morrow he says it was founded on a fraud, that declaration would not be evidence. The present case seems to have gone on this broad ground, that the declarations of any former holder of the bill are evidence; but I am clearly of opinion, that if Pywell had passed the bill away at the time of the declaration, what he says is not evidence. I do not think that the rule, which allows what one man says to be evidence against another, ought to be extended; and whenever a party offers the declarations of a third person in evidence, he must clearly prove that such third person was making such declarations against his own interest, or they ought not to be received.

Rule absolute for a new trial.

PECKHAM v. POTTER.

In an action by the indorsee of a bill against the acceptor, the declaration of the drawer is admissible in evidence, to show that the bill was obtained by fraud. The plaintiff most be, however, shown to be in some way privy to the fraud.

This was an action by the indersee of a bill of exchange against the acceptor. The bill was drawn by a person named Pennel, on the defendant, payable to his own order, for 300l. at two months after date.

*The bill was put in, and the acceptance and indorsement proved. Notice of disputing the consideration had been given by the defendant. The defence was, that the bill had been obtained by fraud, and that the defendant was privy to the fraud.

The defendant's counsel wished to give evidence of Pennel's declarations

acknowledging the fraud.

Vaughan, Serjt., contended, that Pennel's declarations were not evidence in this action.

Lord GIFFORD, C. J. What Pennel said is evidence, in this action, of the original consideration of the bill; but the defendant must prove that the plaintiff is in some way privy to the fraud, or he will be entitled to a verdict.

Evidence was given to show that the defendant was conusant of the fraud Verdict for the defendant.

*Vaughan, Serjt., and Wilde, for the plaintiff. *234] Pell, Serit., for the defendant.

[Attornies—Isaacs, and Wright.]

† Notice of a defendant's intention of disputing the consideration of a bill is often given; I Notice of a defendant's intention of disputing the consideration of a bill is often given; but in point of law it makes no difference in any case, whether it is given or not. The plaintiff is in no case bound to prove a consideration; in an action on a bill, &c., proving the signatures is legally enough; and if a defendant has given no such notice, it is still open to him to dispute the consideration. The only use of such a notice is, that if a defendant has evidence to impeach the consideration, and has given no such notice, the plaintiff's counsel, in reply, will insist that they could have proved a consideration, had they known it would have been disputed: and, therefore, where a defendant is sure that they cannot prove a consideration, he had better put them on doing it by giving notice; but still, if he has given the notice, the plaintiff may rely on the formal proofs, and leave the defendant to prove a want of consideration, if he can.

1 See the case of Poccel v. Billing, supra, page 230.

BEFORE MR. JUSTICE PARK.

CARLISLE et al., Assignees of RUSSEL, a Bankrupt, v. EADY.

If a bankrapt has had his certificate, and has released his assignees, it is sufficient, on an objection to his competency as a witness in an action by his assignees, for him to state that he has released his assignees, without producing the release.

This was an action on several promissory notes, of which the bankrupt was payee. The defendant pleaded the general issue, his own bankruptcy, and the statute of limitations.

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To prove an admission of the debt by the defendant, to take the case out of the statute of limitations, and avoid the effect of the defendant's bankruptcy, the plaintiff's counsel called the bankrupt Russel; on the voir dire he stated, that he had obtained his certificate, and released his assignees.

The defendant's counsel called for the production of the release.

PARK, J. In all the years I have known Guildhall, I never knew such a release called for. It is quite sufficient for the bankrupt to state, on the voir dire, that he has obtained his certificate, and released his assignees. He is then a competent witness.

*The bankrupt was then examined.

Verdict for the plaintiff.

Pell, Serjt., for the plaintiff. Vaughan, Serit., for the defendant.

Attornies—James, and Spencer.]

The rule is, that on woir dire the witness may be asked the contents of written papers, to show that he is incompetent, or, that having been shown, to restore him to his competency: and the reason of this is, that an examination on coir dire is not evidence in the tency: and the reason of this is, that an examination on our stre is not evidence in the cause, but evidence to the judge, for him to decide whether the witness is competent to give evidence in the cause. In the case of Ingram v. Dada, before Lord Ellenborough, at Guildhall, which was an action by an administrator, the next of kin being called, was objected to on voir dire, but was allowed to say in re-examination that he had released. Freemen, and other corporators, are allowed, on voir dire, to say that they have been disfranchised. But if the witness produces the written paper, which is supposed to make him incompetent, it ought to be read to see whether he is so or not.

HARRISON v. ALLEN.

If goods are supplied on sale or return within a year; after the year is expired, if the goods have not been returned, the seller may recover the price on a common count for goods sold and delivered, without any special count.

This was an action for goods sold and delivered. The declaration consisted

of the common money counts, and no special count.

On the part of the plaintiff, it was proved, that in the month of March, 1818, the defendant was supplied with the goods, to the value of 1961.; he was to have them on sale or return, and if he did not return them within the year, he was to pay for them with interest.

*More than a year had elapsed before the bringing of the action. Taddy, Serjt., objected, that the contract being special, for the sale

or return of the goods, the plaintiff could not recover on the common count, for goods sold and delivered, but ought to have declared specially, on the breach of the special contract.

When the time of credit expired, the plaintiff was entitled to bring his action, and if the year elapsed, and the goods were not returned, the

price of them became a mere simple debt.

Verdict for the plaintiff, for 1961. and interest.

Vaughan, Serjt., and Chitty, for the plaintiff.

Taddy, Serjt, for the defendant.

BEFORE BEST, C. J., AND PARK AND BURROUGH, JS.

In Banc.

Taddy, Serjt., now moved for a new trial, on the ground that this was a special contract, and that interest could not be recovered on the common count, for goods sold and delivered, and cited the case of Gordon v. Swan, 12 East, 419.

BEST, C. J. The Court cannot, in this case, grant a new trial, because substantial justice has been done. The only rule the Court could grant, would be to reduce *the verdict to the amount of the debt, without interest; but as that would only lead to the bringing another action for the interest, the Court, in mercy to all parties, must refuse that rule.

The other judges concurred.

Rule refused.

The cases of Leeds v. Burrows, 12 East, 1; Mussen v. Price, 4 East, 147; Gordon v. Swans, 12 East, 419; Slack v. Lewell, 3 Taunt. 157, go to show, that if goods are sold on credit, a plaintiff may recover on the common count for goods sold, when the credit has expired. But it is much more prudent to add one or more special counts on the contract, as it was; for, in Gordon v. Swans, the jury had not given interest from the time when the credit expired, and the Court would not disturb the finding of the jury, and sefused a motion for a new trial.

MILLER v. WARRE.

A ship going from London to Grenada, and back, having been forty-eight hours in a port in Grenada, has concluded her outward voyage. If she goes afterwards to other ports in the same island, to deliver outward cargo, and receive contracts for homeward freight, and so is lost, this is a loss on her homeward voyage. A ship-owner who has entered into contracts for freight has an insurable interest in the freight, though the contracts are not in writing. If a bill of exceptions is tendered to a judge, the facts still go to the jury, but a demurrer to evidence stops the case.

Assumpsit, on a policy of insurance on the ship Aurora and her freight, at and from Grenada to London, with leave to call at all, or any of the West India Islands.

The loss was by perils of the seas.

The ship had sailed on her outward voyage, with stores for different estates

in that island, but the defendant had not insured her on that voyage.

On the 16th of January, 1823, the ship arrived, after her outward voyage, at Grand Mal Bay, in the island of Grenada, and there delivered part of her outward cargo, and remained forty-eight hours; she then proceeded to different *bays in that island, and delivered other parts of her outward cargo.

At each of these bays, the captain entered into verbal contracts with the agents of different estates, for them to ship sugars on board the Aurora, on her voyage home; and the quantity each agreed to ship he entered in a book. The ship then proceeded to Grenville Bay, to deliver the residue of her outward cargo, and on entering that Bay was totally lost. None of the homeward cargo had been taken on board.

For the plaintiff, it was contended, that the outward voyage was terminated by her staying forty-eight hours in *Grand Mal Bay*; and that, as soon as she left *Grand Mal Bay*, the homeward voyage commenced, and the homeward policy of the ship attached; and as to the freight, as contracts were made for the sending of the sugars, the plaintiff had an insurable interest in such freight and could recover for it on this policy, though none of the sugars had been

actually put on board.

For the defendant, it was urged, that if the outward voyage had ended at Grand Mal Bay, the ship's going to the different ports to deliver outward cargo, was no prosecution of the homeward voyage, and was, therefore, a deviation. And as to the freight, there was no written contract to oblige the agents of the estates to send a particular quantity of sugar; it was a mere understanding between them and the captain, that they were likely to have those quantities of sugar to be put on board his ship.

PARK. J. I am clearly of opinion, that in this case there was no deviation; the outward voyage of the ship had ended by her being forty-eight hours in Grand Mal Bay, and she proceeded to the other Bays, not only to deliver the remainder of the outward cargo, but to get contracts for *her homeward cargo; in fact, these ships always go from port to port in the West India islands. In the case of Camden v. Cowley, 1 Bl. 418, the ship was lost in going from port to port, to deliver her cargo. Lord Mansfield, at first, held it was a deviation, but the Court above were of a different opinion, and other cases have followed on the same principle.†

As to the freight, the cases have decided, that if there is a contract for freight, the underwriter is liable, and I think a written contract is by no means

necessary.1

Vaughan, Serjt., tendered a bill of exceptions, as to the supposed deviation. Taddy, Serjt., contended, that a bill of exceptions stopped the case from going to the jury.

Park, J. On a bill of exceptions, the case always goes *to the jury; [*240

but, on a demurrer to evidence, it is otherwise.

Verdict for the plaintiff, damages, 1951.

Pell, Bosanquet, Serjts., Campbell, and Wilde, for the plaintiff. Vaughan, and Taddy, Serjts., for the defendant.

[Attornies—Alliston and H., and Lavie.]

† The case of Cruickshank v. Jansen, 2 Taunt. 301, decides, that a ship insured at and from Jamaica to London, may go from port to port, in Jamaica, without being guilty of a deviation. Leigh v. Mather, 1 Esp. 412, decides, that where a ship is insured to an island generally, the policy determines by her being twenty-four hours in any port of that island. The cases of Hammond v. Reed, 4 B. & A. 72, and Solly v. Whitmore, 5 B. & A. 45, decide, that if a ship touches at a place for any purpose, unconnected with her voyage, it is a desiration, though by the terms of the policy she has leave to couch there.

decide, that if a ship touches at a place for any purpose, unconnected with her voyage, it is a deviation, though by the terms of the policy she has leave to touch there.

† In Montgomery v. Egginton, 3 T. R. 362, it was held, that where by the loss of the ship the freight insured was totally lost, the party was entitled to recover the whole amount, though only part of the goods were on board, the rest being ready to be put on board; and in Patrick v. Eames, 3 Camp. 442, Lord Ellenborough laid down, that if a contract be proved, for supplying the ship with a full cargo, at a stipulated rate of freight, and by some event the assured had been deprived of a profit they must otherwise have certainly received, they would have a right to resort to the underwriters for a full indemnity. "Nor should I," said his lordship, "have considered it material, whether that contract was, or was not, under seal, or whether it was written, or merely verbal."

§ A bill of exceptions may be tendered in any civil case, where a party is dissatisfied with the ruling of the judge at the trial, or of the judges if the trial is at bar. It cannot be tendered at the quarter sessions. The use of it is, to put on the record the opinion of the judge, so that such opinion may be considered in courts of error, to which the record may be removed. Bills of exceptions are founded on the statute 13 Ed. 1, c. 31, which enacts, that "if one impleaded before any of the justices, allege an exception, praying

may be removed. Bills of exceptions are tounded on the statute 13 Ed. 1, c. 31, which enacts, that "if one impleaded before any of the justices, allege an exception, praying that the justices will allow it, and they will not, and if he write the exception, and desire the justices will allow it, and they will not, and if one will not, another shall." Demurrers to evidence may be put in, at nisi prime, where the counsel of one party considers that the evidence adduced by the opposite party does not prove the issue on the record. But by demurring to the evidence, the party admits, that all that the witnesses have said is true. The case of Wright v. Paul Pindar, Alleyn, 18, and Style, 22, 34, decides, that in demurring to evidence, the party admits all the facts to be as proved by the evidence be demurs to: and in Cockeedge v. Panelson, Doug. 114, Lord Manafeld

lays down, that by demurring to evidence, the party admits every fact that the jury couse have found upon that evidence; and in Baker's case, 5 Rep. 104, it is laid down, that if evidence in a suit by the king be demurred to by the defendant, the king's counsel is not bound to join in demurrer, but the jury ought to find the special matter; and in Worsley v. Filisher, 2 Roll. Rep. 119, the court overruled the demurrer, and left the case to the jury. From thit, it seems, that a judge at nisi prims, might, if he thought the case clear, overrule the demurrer to evidence. In giving the opinions of the judges in the House of Lords, in the case of Gibson & Johnson v. Hunter, 2 H. B. 205, Eyre, C. J., says, that there is a good deal of confusion, with respect to a demurrer upon evidence, and a bill of exceptions; the distinct lines of each not having been kept apart so much as they ought to have been; and in the very recent case of Bulkley v. Butler, K. B., Jan. 15, 1824, before the judges in banc, sitting under the king's warrant, Best, J., in a very elaborate judgment on that case, said: Lord Chief Justice Eyre expressed doubts, as to what were the offices of bills of exceptions, and demurrers to evidence. That learned judge then spoke of eleven of the judges in the House of Lords. It would, therefore, be presumption in me to attempt to define them. Bills of exceptions are founded on a statute which ought to have a most liberal construction. The statute clearly applies to challenges of jurors, and to evidence, where the objection to the jurors or the evidence has been everuled. And I think it ought to be extended to cases where evidence is improperly admitted. A demurrer to evidence stops the case from going to the jury; but, on a bill of exceptions, the case still goes to the jury.

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*RICHARDSON v. MELLISH.

A book kept at the *India House*, from returns given in on oath under the stat 53 G. 3, c. 155, of the number of passengers going on board India ships, is evidence. An agreement between an *East India* ship owner and one of his captains, for that captain te archange commands with another captain, is not illegal; and such an exchange of commands, is a sufficient consideration for either party, in an action on other terms of such an agreement. The stat. 49 Geo. 3, c. 126, relative to the sale of offices under the *East India Company*, applies only to their public offices, and not to the commands of their ships; these being merely in their trade, as merchants.—Per *Burrough*, J.

The plaintiff in this cause had been captain of the East India ship Minerva, which was purchased by the defendant and others, his co-owners, of Messrs. Smith 4. Co. The defendant, wishing his nephew, Captain Mills, to have the command of the Minerva, entered into an agreement with the plaintiff to the

following effect:-

"It is this day agreed between William Mellish, Esq., and Captain George Richardson, that provided William Mellish shall purchase the Minerva, and the East India Company consent, George Richardson will give up the command to Captain Mills, and Mr. Mellish to give Captain Richardson the command of the Marquis of Ely; but if Captain Mills should die, or give up the command, it is agreed that Captain Richardson shall *resume the command of the Minerva. And it is further agreed, that this shall only relate to the four remaining voyages."

The Minerva had been originally chartered by Messrs. Smith to the East India Company for six voyages, four of which only remained to be performed at the time of the purchase by the defendant, and of the agreement above

stated.

Previous to this time, Captain Mills had commanded the Marquis of Ely. According to this agreement, Captains Richardson and Mills exchaged ships, with the consent of the East India Company, who, however, never knew the terms of this bargain: and soon after this, the Marquis of Ely was ordered on a voyage to China, direct, which is considered a bad voyage, and the plaintiff applied to the defendant to get it changed to a voyage to China and St. Helena, which is a much better voyage. This the defendant did, and it was contended

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that the plaintiff at this time gave up this agreement; but evidence was also

given to show that the defendant considered it as continuing.

After two voyages in the Minerva, Captain Mills died, leaving two of the "remaining four voyages" (mentioned in the agreement) still to be performed. The plaintiff then applied to the defendant for the command of the Minerva, which was refused him. He had previously become bankrupt, but the defendant did not give that as the reason of his refusal; but said, that the agreement was given up. After one more voyage, (that is, the third after the agreement) the defendant, it appeared, had entered into a contract to sell the ship Minerva; and the plaintiff brought the present action for breach of the agreement.

It appeared that, originally, the agreement was of two parts; and that the plaintiff had one, and the defendant the other; but at the time the defendant got the voyage *of the Marquis of Ely changed, the plaintiff gave him his part of the agreement—(as one party contended, by way of cancellation; and as contended by the other party, only for safe custody.) The plaintiff had given the defendant notice to produce this, and also the other part. The former, it appeared, had been accidentally burned, but the latter was produced in pursuance of the notice. It was read, and evidence given of the facts, to prove a breach of it, as before stated.

To prove the loss of the plaintiff, several East India captains stated that the voyages were worth from 5000 to 7000l. each to the captain, by reason of his passengers and private trade. And a book, kept at the *India House*, containing the number of passengers sworn to by the captains, under the statute 53 Geo. 3, c. 155, s. 15, 16, was produced, to show what number of passengers had

gone on board the Minerva on the third voyage after the agreement.

The admissibility of this book was objected to, on the ground of its being a book kept only for a particular specific purpose, and therefore not evidence.

Lord Gifford, C. J., admitted it, because it was a public book, kept by the

authority of an act of Parliament.

The principal ground of defence insisted on at the trial was, that the agreement had been given up by the plaintiff; and evidence was adduced to show that fact. The defendant's counsel also contended, that this agreement was void under the by-laws of the *East India Company*, by one of which, chap. 13, s. 11, it is ordained, that no owner or part owner of any ship shall take any consideration, or make any contract for any consideration, for the appointing of any person to the command of such ship; and if he does, such owner or part owner shall forfeit *double the amount of such consideration, and his or their ship be discharged."

Lord Gifford, C. J., intimated, that points of this sort had better be discussed in another stage of the cause; and left it to the jury to say whether the agreement had been given up: and if they thought it had not, they would find a verdict for the value of the two voyages which remained on the death

of Captain Mills.

Verdict for the plaintiff-Damages 75001.

BEFORE BEST, C. J., PARK, AND BURROUGH, JS.

In Banc.

In the ensuing Easter Term, Pell, Serjt., obtained a rule nisi for a new trial or for arresting the judgment.

This rule now coming on to be argued, the Court called on the defendant's

counsel to support the rule. And

Pell, Laws, and Wilde, Serjts., contended there ought to be a new trial:—
1st. Because the jury had given damages for the loss of the two voyages which were to come after the death of Captain Mills; whereas they ought only to have given damages for that one subsequent voyage which had been actually made.

2d. That the book containing the number of passengers was not admissible in evidence.

3d. That the agreement was illegal.

4th. That there was no consideration for the agreement.

On the first point they argued, that the jury could not give damages for the two voyages; because, as one of them remained now to be made, circumstances might still happen to prevent the possibility of the last voyage being made at all:—such as, the loss of the ship, or the plaintiff's death before that voyage, or his declining to go on it, or the defendant might still appoint him for that voyage; and, therefore, the defendant had only broken the agreement by not sending him on that voyage; and, consequently, all the injury he had sustained, and all that he might sustain, was the loss of that one voyage only: and as the captain is appointed separately for each voyage, each omission to appoint is a separate breach; and if the plaintiff had intended to sue for the two breaches in one action, he should have stayed till the last of the voyages was complete.

On the second point they argued, that as the book is kept under the act of parliament for a specific purpose, when that purpose was answered the book was of no further use, and had no reference to these parties or to this dispute

between them.

As to the third point, the illegality of the agreement, it was urged, that this sort of bargain was a fraud on the East India Company and on the other owners, for they were entitled to the fair unbiassed choice by the defendant; and if he appoints for a pecuniary or other consideration, they are injured, because he does not appoint the person he would, if no consideration passed; and they cited Card v. Hope, 3 Dow. & Ry.: and by the statute 49 Geo. 3, c. 126, the provisions of the stat. 5 & 6 Edw. 6, c. 16, are extended to "all offices, commissions, places, and employments, belonging to or under the appointment or control of the united Company of Merchants of England trading to the East Indies;" and by the earlier statute, any person who shall make any promise, agreement, bond, or assurance, for any money, reward, or fee, in respect of the sale of any office, shall be disabled from holding the office; and the words of the last statute are quite large enough to take in the commands of the East India Company's ships.

On the fourth point it was contended, that there was no *consideration for this agreement; because, when the defendant bought the ship, he had a right to turn out the plaintiff and appoint another captain: the plaintiff's consent was not required for the appointment of Captain Mills, and,

therefore, he merely consented to what he had no power to hinder.

BEST, C. J. On the first point I am clearly of opinion, that the jury might give damages for the loss of both voyages; for when the defendant broke the agreement, by sending out another captain, it was manifest he did not mean to abide by it, and, therefore, the jury were right in giving damages for the breach of the whole agreement: if they were not so, the number of actions would be infinite.

As to the second point, I think the book clearly admissible. It is a public document, made from returns on oath, given in under an act of parliament; and is evidence, the same as the books of the Bank and other public books.

It appears to me, on the third point, there is no ground for saying there was any fraud on the *East India Company*; for they knew of the exchange, and

the acts of parliament relate only to money or direct emolument, and not to

exchanges like the present.

As to the last point, I think that unless it clearly appears on the record that there was no consideration, we should be bound to presume in favor of the consideration, after verdict; but this mutual exchange, if it is not illegal, is an abundant consideration.

PARK, J., observed, that the book was clearly evidence as a public document; and that the jury were right in giving damages for the two voyages.

BURROUGH, J. If there is something to be done on one side, and something on the other, it has always been held, that this is a sufficient consideration to support a promise. I think also, that the statute 49 Geo. 3, applies only to the public situations and offices under the Company, and not to the commands of their ships, which are merely in their trade as merchants. As to the damages, the agreement is for four voyages; and the defendant, by disposing of the ship, has put it out of his power to perform the rest of the bargain.

Rule discharged.

Vaughan, and Bosanquet, Serjts., for the plaintiff. Pell, Lawes, and Wilde, Serjts., for the defendant.

[Attornies—Swaine & Co., and Street & Co.]

GIBSON v. MINET et al.

If a person direct his banker to hold a sum of money at the disposal of a third person, the party so ordering may countermand his order at any time before the banker has paid the money to such third person, or entered into some equivalent arrangement with him, incompatible with a countermand of the order.

Assumpsir for money had and received. The plaintiff was a merchant, at Cork, who kept cash with the defendants, who were bankers in London; and the question was, whether a sum of 400l. in the defendants' hands, belonged to the plaintiff, or to Messrs. Mintor & Co. From the admissions in the cause, it appeared, that in the month of May, 1822, the plaintiff's balance in the defendants' hands, was 543l. 7s. 10d., and that, on the 8th of May, 1822, he wrote to the defendants the following letter, (which was delivered to them by Mr. Mintor, on the 13th of July, 1822.)

"Waterford, 8th July, 1822.

" Messrs. Minet & Stride.

" Gentlemen,

"I request you to hold over four hundred pounds, from my private account, to the disposal of J. Mintor & Co. "Wm. Gibson."

*Soon after the receipt of this letter, one of the defendants wrote with a pencil on the debit side of the plaintiff's account, in their ledger—

By Mr. Gibson's letter, of 8th July, 1822, 400l. is to be held at the disposal of Messrs. Minter & Co."

On the 18th of *March*, 1823, the plaintiff wrote to the defendants, that the 400l. was only at Messrs. *Mintor's* disposal, to answer any losses that might have occurred in a speculation, which had turned out successful; and, therefore, desired they would hold the money to his (the plaintiff's) use.

On the 2d of April, 1823, the defendants received a letter from Messrs. Mintor, desiring that the money should be still held at their disposal.

On the 9th of April, 1823, entries were made in the defendants' books,

debiting the plaintiff, and giving credit to Messrs. Mintor for this sum.

And on the 9th of April, 1823, the defendants wrote to the plaintiff (enclosing an extract of the letter of Messrs. Mintor, dated April 2d, 1823) in the following terms:

" London, April 9th, 1823.

"Mr. Wm. Gibson,

4 Sir.

"We sent to our friend, Mr. Mintor, a copy of your letter, of 18th March, and having received his answer, we hasten to transmit you the annexed extract, according to which, we now transfer from your account, the 400l. you directed to be held at his disposal.

" We are, &c.,

"Minet & Stride."

In addition to this, a witness for the defendants proved, that when Mr. *Mintor* delivered the first letter, Mr. *Stride* asked him if he would have the money; he said No, I only wish it to be held at my disposal; and Mr. *Stride* said it should be so.

*On the part of the plaintiff, it was contended, that the bankers not having paid over, or transferred, the money to Messrs. *Mintor*, and as no transfer was made till the 9th of *April*, 1823, the plaintiff might revoke his order, and have the money held to his use; and cited *Williams* v. *Everett*, 14 Ea. 582.

The defendants' counsel contended, that the defendants agreeing with Mintor to hold the money for him, was such a transfer, as put it out of the plaintiff's

power to countermand his order.

Lord GIFFORD, C. J. The only question is, whether *Mintor* asked the bankers, at the time of delivering the order, to hold the money absolutely for him, or whether he only desired them to hold it at his disposal, in case he should want it for the purposes of the speculation, in which the plaintiff and himself were engaged. If the latter were the case, the plaintiff is entitled to recover.

Verdict for the plaintiff, for 400l.

Vaughan, Serjt., for the plaintiff.

Pell, Serjt., and F. Pollock, for the defendant.

[Attornies-Holt, and Dawes & Chatfield.]

BEFORE BEST, C. J., PARK AND BURROUGH, J&

In Banc.

Pell now moved for a new trial, on the grounds which were urged at the trial.

BEST, C. J. I concur with the opinions of the judges in the case of Williams v. Everett; and the whole question is, whether at the time when the money was *transferred to Mintor, he was in the first instance asked, if he would have the money; he says "no, hold it at my disposal." That is certainly not a paying over by the bankers; and after the countermand they say, "we now transfer to Mr. Mintor," and then enter the transfer in

their books. If, while the authority remained, Mintor had drawn the money out, the plaintiff would have been bound, but before that was done, the order might be legally countermanded.

PARK and BURROUGH, Js., concurred.

Rule refused.

In the case of Williams v. Everett and Others, 14 East, 582, a person named Kelly had remitted bills to the defendants, for them to pay 300l. to the plaintiff, and various other aums to other persons. The defendants received the money on the bills; but, when called upon, refused to pay over the 300l. to the plaintiff. The Court held, that under these circumstances, the plaintiff could not maintain any action for money had and received, against the defendants, there being no privity of contract, express or implied, between them; Lord Ellenborough saying, "by the act of receiving the bill, the defendants agree to hald its contents, when paid, for the remittor. The remittor may give and countermand his directions, as often as he pleases, and the persons to whom it was remitted, may hold the bill, or its amount, for the use of the remittor himself; until by some engagement entered into by themselves, with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they have once given, but are bound to hold it for the use of the appointee."

CASES

AT

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SITTINGS IN AND AFTER EASTER TERM

COURT OF KING'S BENCH.

SITTINGS IN MIDDLESEX, IN EASTER TERM, 1824

BEFORE MR. JUSTICE LITTLEDALE.

(Who sat for the Lord Chief Justice.)

MAYOR v. HUMPHRIES.

In an action by a passenger in a coach against the owner for an injury done him by the coach overturning; if the declaration states that the servants of the defendant negligently "drove, conducted, and managed, the coach," the plaintiff cannot recover, if the negligence was in sending out an insufficient coach.

THE declaration stated, that the defendant was before and at the time, &c., owner of a certain stage coach; and that he, in consideration, &c., undertook, &c., to carry the plaintiff safely; that the plaintiff, confiding, &c., did go by the coach, and that the servants of the defendant so negligently and unskilfully "drove, conducted, and managed" the said coach, that the coach was overturned, and plaintiff injured.

It appeared, that when the coach overturned, it was proceeding at a furious

rate, and that on its going over one of the wheels came off.

The defence was, that the coach overturned, not from the negligence of the driver, but from the linch-pin coming out; and therefore, that this action being for an injury done by the negligent driving, the plaintiff could not recover.

*Gurney, in reply, contended, that it was just as much actionable for the defendants to injure their passengers by negligently sending out an

insufficient coach, as a bad coachman.

LITTLEDALE, J. I am decidedly of opinion, that if the accident happened from the insufficiency of the coach, the plaintiff cannot recover on this declaration. If the negligence was in sending out an unsound coach, the plaintiff should have laid it so in his declaration, for I have no hesitation in saying, that the words "conducted and managed," coupled with the word "drove," clearly mean conducting and management, ejusdem generis, and not management, as respects the providing of a proper coach.

His lordship left it to the jury to say, whether the injury arose from negli-

gent driving, or an insufficient coach.

Verdict for the plaintiffs, damages 251.

Gurney, and Comyn, for the plaintiff. Scarlett, and Chitty, for the defendant.

[Attornies, ———.]

There can be no doubt that stage coach proprietors are equally liable for injuries sustained by their passengers, from their negligence, whether that negligence is in having a bad or negligent coachman, or an insufficient coach. But it is, of course, necessary to doclare for the negligence that you can prove; and, indeed, I can see no objection, if there be the least doubt as to what misconduct of the coach owners, or their servants, was the cause of the accident, to laying it differently in different counts. It has been held, that the overturning, or breaking down of the coach, is prima facie evidence of negligence on the part of the owner of the coach. 2 Camp. 79. But the owner of the coach is not liable for the personal injury sustained by the passengers, through any accident, not arising in any degree from the negligence of the owner of the coach, or his servants. 3 Camp. 81.

*RUDGE et al. v. FERGUSON.

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In an action by the assignees of an insolvent debtor, to recover money from one of the creditors, which ought to have gone to the general fund, the insolvent is not a competent witness on the part of the plaintiff.

This was an action by the assignees of an insolvent debtor, against a creditor, who was alleged to have received a sum of money which higher to have gone to the assignees to have been distributed among the whose body of the creditors generally.

The insolvent himself was called as a witness for the plaintiffs.

Gurney, for the defendant, objected, that every insolvent is interested in

enlarging the estate.

Scarlett, for the plaintiffs. The insolvent is equally a debtor, whether, by his evidence, he procures the money to be recovered by the assignees, or to be retained by the present defendant. He has the same sum to account for out of any future property he may acquire: it only changes the party to whom he is liable.

Gurney. It is important for him to deliver himself from future responsibility. A bankrupt, in such an action, is clearly an incompetent witness; because, by his evidence, he may increase the funds, so as to make them pay 20s. in the pound, and leave a surplus for himself.

LITTLEDALE, J. It appears to me this witness has an immediate interest in getting the money into the hands of the assignees.

The witness was then rejected.

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*Scarlett, and Chitty, for the plaintiffs. Gurney, and Godson, for the defendant,

[Attornies—S. Fisher, and Goren & L.]

The insolvent, if permitted to be a witness, would have an opportunity of swearing that a larger sum was due than really was so; and thus, by getting money wrongfully into the hands of his assignces, would, pro tanto, discharge his future effects.

SITTINGS AFTER EASTER TERM, AT WESTMINSTER.

BEFORE MR. JUSTICE LITTLEDALE,

(Who sat for the Lord Chief Justice.)

RIMELL v. SAMPAYO.

If the coachman of a party go in his master's livery, and hire horses, which his master uses, the master will be bound to pay for the hire of the horses, though he has agreed with the coachman that he will pay him a large salary to provide horses; unless the lender of the horses had some notice that the coachman hired them on his own account, and not for his master.

This was an action to recover the sum of 421., for the hire of a pair of car-

riage horses for four months.

The first witness called was the plaintiff's ostler, who proved that the defendant's coachman came, in his master's livery, to the plaintiff's stables, and represented that he wanted a pair of job horses for the defendant's carriage; and an agreement was made with him at ten guineas a-month. The coachman took them away, and the defendant was seen several times afterwards by the witness riding in the carriage in which the horses were.

Scarlett, for the plaintiff, called for the production of the bill for the hire, which had been delivered to the coachman, (notice having been given to the

defendant to produce it.)

*Marryatt, for the defendant. There is nothing which shows that we have it in our possession.

Scarlett. The coachman appears to be the agent of the defendant; and therefore the defendant is bound to produce the bill.

LITTLEDALE, J. As far as the evidence has gone yet, the coachman appears

to me to be the agent of the master.

Marryatt. That is not enough: they must prove that he acted by the master's authority.

LITTLEDALE, J. I think that is not necessary; for the master uses the

The plaintiff's clerk was then called; who confirmed the testimony of the ostler as to the hiring being in the name of the master, and produced an entry

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in his book, made at the time of the hiring, in which the name of the defend ant only was mentioned.

The Tax Collector also proved, that the defendant paid taxes for a carriage

and pair of horses.

A receipt for part of the money had been given in the name of the coachman; and it appeared that no bill was made out till after the expiration of the four months.

This being the plaintiff's case—

Marryatt, for the defendant, called several witnesses; who proved that the defendant contracted with his coachman, at 220l. a-year, to provide horses and his own livery, and every thing connected with the carriage. He also called the coachman; who distinctly contradicted the evidence of the ostler as to the hiring being in the name of the defendant, but admitted, on his cross-examination, that he told his master where he had hired *the horses; and also, [*256 that when he took the horses back, his master advanced him 5l., to help to pay for them. It appeared that the defendant had paid the coachman all that was due to him under their agreement.

LITTLEDALE, J. The principal question will be, what representation was made by the coachman at the time of the hiring. If he made the contract in his own name, and represented to the plaintiff the agreement between himself and his master; of course, under such circumstances, the plaintiff cannot recover. But if he made no such representation of any agreement between himself and his master, I think that, by the master's sending him forth into the world, wearing his livery, to hire horses, which he (the master) afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire. This sort of bargain between a gentleman and his coachman, appears to be rather unusual, and ought not to prevent the plaintiff from having recourse to the master. A master may be prevented by business, or want of time, from making a bargain himself, and may send his servant; and provided the business be within the regular department of the servant, the master is clearly liable.

The jury, after inquiring of his lordship, whether, in his opinion, there was evidence of any direct application to the master by the plaintiff, and receiving an answer in the negative, found a

Verdict for the defendant.

Scarlett, and Chitty, for the plaintiff.

Marryatt, and Barnewall, for the defendant.

[Attornies-Hitchcock, and Addis.]

*SITTINGS AFTER EASTER TERM, IN LONDON,

BEFORE LORD CHIEF JUSTICE ABBOTT.

LAING v. MEADER.

A plea of tender is not supported by proving that the defendant took a sum of money out of his pocket, and said to the plaintiff, "If you will give me a stamped receipt, I will pay you the money:" as by the stat. 43 G. 3, c. 126, the payer of money may provide the stamp, and charge for it: and a tender must always be unconditional.

Work and labor. Balance claimed, 151. 16s. The defendant pleaded a tender.

The witness called to prove it, stated, that the plaintiff and defendant were at a public-house together; the defendant took out of his pocket between 601. and 701., and said, "If you will give me a stamped receipt, I will pay you the money." The plaintiff replied that he would not take it, but would serve him with a Marshalsea writ.

ABBOTT, C. J. This is no proof of a tender: the offer of the money must be unconditional. A party has no right to say, "I will pay you the money, if you will give me a stamped receipt;" but he ought, according to 43 Geo. 3, c. 126, to bring a receipt with him, and require the other party to sign it.†

Verdict for the plaintiff.

Gurney, and Talfourd, for the plaintiff. Scarlett, for the defendant,

[Attornies-Arden, and Harnett.]

† By § 4, of that act, the person from whom the money is due may provide the stamp, and require the receiver to give him a receipt, and pay the amount of the stamp duty; and if the receiver refuses, he is liable to a penalty. A tender must be in money, and the money ought to be produced; it should be unconditional, and, in general, a tender of a larger sum, with a request to have change, is not good.

*258] *ADJOURNED SITTINGS AT WESTMINSTER.

BEFORE MR. JUSTICE LITTLEDALE,

(Who sat for the Lord Chief Justice.)

REX v. MARY HAILEY

An indictment for perjury may be supported against a marksman, for swearing falsely in an affidavit, though it would not be receivable in the Court it was sworn in, because the jurat did not state that it had been read over unto the party swearing it: but the person administering the oath must prove, that the party swearing it in fact understood its contents.

The perjury is complete at the time of the swearing of the affidavit; and whether it is

receivable in the Court or not is immaterial, if the reason why it is not receivable is, that some formal regulation is not complied with.

You cannot convict for perjury on an affidavit, if it refers to a former affidavit, which you are not in condition to prove.

are not in condition to prove.

INDICTMENT for perjury, in two affidavits, sworn before Master Trower, relative to a bankruptcy...

The first of the affidavits was produced by a clerk from the secretary of

bankrupt's office.

The affidavit was signed with the mark of the defendant, and the jurat did not state either where it was sworn, or that the affidavit was read over to the

party.

Andrews objected, that this affidavit could not be read, on account of these omissions in the jurat, and called a witness, who was a clerk in the master's office, in Southampton-buildings, who stated, that in cases where the party swearing the affidavit could not write, the jurat ought, after stating the place where it was sworn, to state that the witness to the mark of the deponent had been first duly sworn; that he truly, distinctly, and audibly read over the affidavit to the deponent, and saw the mark affixed.

Taunton, for the prosecution, contended, that the Court ordering the jurat to state particular things, was merely matter of direction. If the Court finds the affidavit not according to rule, it will not allow it to be read, and yet perjury may be assigned on it. The false swearing is not the less perjury because

the jurat is not regular in form.

*LITTLEDALE, J. There must be evidence given that the affidavit was sworn in *Middlesex*, and as the defendant is illiterate, it must be shown that she understood it. In those cases, where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents; but in the case of a marksman it is not so. If in such a case the master, by the jurat, authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the parol evidence of any other person to that fact. My opinion is, that though the affidavit be deficient in point of form, yet, if it distinctly appear that it was sworn in *Middlesex*, and that the party swearing was acquainted with its contents, it would be sufficient; and the mere practice of the Court of Chancery would only affect its reception in that court, and not prevent an indictment for perjury being founded on it; for the perjury is complete at the time of the swearing.

Master Trower, being called, proved that the affidavit was sworn at his house, and that that is in the county of Middlesex; but he did not know

whether the affidavit was read to the defendant or not.

LITTLEDALE, J. You cannot prove an assignment of perjury on this affidavit, there being no evidence whatever of any reading over in the presence of the deponent.

The counsel for the prosecution were then about to proceed on the other affidavit, (which had a perfect jurat;) but it appearing that it referred to the former affidavit,—

LITTLEDALE, J., ruled, that it could not be read.

Verdict—Not Guilty.

*Taunton, and Russell, for the prosecution. Andrews, for the defendants.

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BEFORE LORD CHIEF JUSTICE ABBOTT.

REX v. WILLIAM SPENCER.

On an indictment for perjury, the proving the handwriting of the signature of the person who administered the oath, is sufficient proof that it was sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place.

Ferisace.—If an indictment for perjury in an answer in Chancery recites the bill as for a specific performance of an agreement (inter alia) for a lease of land "adjoining the new house," and in the bill it is "adjoining the new house," this is a fatal variance, though the perjury is not assigned on any thing sworn as to this clause of the agreement.

INDICTMENT for perjury in an answer in Chancery. The indictment stated, that the prosecutor, John Edwards, had exhibited his bill in Chancery for the specific performance of an agreement, whereby the defendant agreed with the prosecutor, that if the prosecutor would lay out 2001. in building two fourthate houses, the defendant would execute a lease of a certain piece of ground in St. Anne's-place, adjoining the new houses, and that the prosecutor should enjoy a way which the defendant used; and that the bill interrogated, whether the defendant had not signed this agreement; and that the defendant in his answer swore, that when he executed the agreement, it contained the words, "so long as the right to go along such way remains in William Spencer under William Pritchard." Which words had been since erased. On this the perjury was assigned.

To support this indictment, a person from the Six Clerks Office produced the original bill and answer, and a witness proved the defendant's signature to

the latter.

A clerk from the Master's office, Southampton-buildings, proved Master Trower's signature to the jurat.

*Gurney objected, that it was not proved that the answer was sworn

in the county of Middlesex.

ABSOTT, C. J. The Courts always give credence to the signature of the magistrate, or commissioner; and if his signature to the jurat is proved, that is sufficient evidence, that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place.

The jurat was read; it was "sworn at the Public Office, Southampton-

Buildings, London, this eighth day of March, 1823, before me,

"James Trower."

The witness, however, stated, that the Public Office in Southampton-Buildags, is in the county of Middlesex, and not in the city of London.

Gurney. Your lordship can give no credit to this jurat as evidence, as one part of it must be untrue; for either the answer was sworn in London, and not in the Public Office, or was sworn at that office, and not in London.

Scarlett, contra.—The jurat must be taken to be correct evidence, except where it is proved to be wrong; we have proved that the Public Office is not in London, but in Middlesex.

ABBOTT, C. J. I shall not stop the case on this objection, you may have the benefit of it hereaster.

The bill in Chancery was read. It stated the agreement to be the same as it was described in that part of the indictment which set out the substance of the bill, except that it stated, that the defendant agreed to execute a lease

*of certain ground in St. Anne's Place, "adjoining the new house," instead of "adjoining the new houses."

The defendant's counsel contended, that this was a variance.

ABBOTT, C. J. The indictment professes to set out the substance of the bill, and this is materially different; for, in the bill, the land is said to be contiguous to one house: in the indictment, to more than one. This is a fatal variance.

The defendant was, therefore, acquitted.

Scarlett, and Hutchinson, for the prosecution.
Gurney, and E. Lawes, for the defendant.

[Attornies-Norton, and Stratton & A.]

In the case of *Hoare v. Mill*, 4 M. & S. 470, the plaintiff declared in covenant, on a lease of a wharf and store-house; when the deed was produced, it appeared to be a lease of a wharf and store-houses; this was held to be a fatal variance, though no breach was assigned on that part of the deed.

PHILLIPS v. MOSELY et al.

If the issue is, whether the plaintiff is tenant of the defendant under a demise, "for one year, from the 23d of April, 1821, and thence afterwards, from year to year;" evidence that the plaintiff has paid the defendant rent, is not sufficient proof of the demise in issue.

TRESPASS for breaking and entering the plaintiff's house. Pleas—General issue; and, 2d, that the house was the freehold of the defendant, Mosely; and that the *rest were his servants. Replication, that though it was Mosely's freehold, yet the plaintiff held it as tenant to Mosely, under a demise, from the 23d of April, 1821, for one year, and thence afterwards from year to year. On this fact, issue was joined.

A witness for the plaintiff had proved payment of rent; but stated, on cross-examination, that the plaintiff had said, he held under a written agreement.

ABBOTT, C. J. The plaintiff ought to put in this agreement, because, on this issue, he undertakes to prove a demise, for one year, from the 23d of April, 1823, and afterwards, from year to year.

Thessiger, for the plaintiff, contended, that as the agreement was not the ground of the action, any species of evidence that showed the plaintiff to be

tenant was sufficient.

ABBOTT, C. J. Not on this issue; and besides, the evidence given, of payment of rent, is consistent with a demise, very different from that laid. Payment of rent would be as much proof of a demise, for twenty-one years, as of the demise laid in the replication.

The cause was, however, referred to arbitration.

Thessiger, for the plaintiff.

Marryatt, for the defendant.

[Attornies-Willougnoy, and Pitman.]

*ADJOURNED SITTINGS AFTER EASTER TERM, IN LONDON.

BROWN v. ROBINSON.

Administering medicines while in the service of another person, as an apothecary's sasistant, is not a practising as an apothecary, within 55 Geo. 3, c. 194, s. 22, though the person so administering the medicines is himself paid for them.

Assumest for an apothecary's bill. By the statute, 55 Geo. 3, c. 194, s. 22, no apothecary shall be allowed to recover any charges, in any court of law, unless he prove on the trial, that he was in practice, as an apothecary, prior to, or on the 15th of August, 1815, or that he has obtained a certificate to practise as an apothecary, from the master, wardens, and society of apothecaries.

To prove that the plaintiff had practised as an apothecary, before the 15th of August, 1815, three witnesses were called, who proved, that he had extended them as an apothecary, prior to that time, but that during the whole time of such attendance, he was an assistant in the house of another apothecary, though they always paid the plaintiff, and not the person he was assistant to.

though they always paid the plaintiff, and not the person he was assistant to.

ABSOTT, C. J. This is nothing like proof that the plaintiff practised as an spothecary. No practice, while in the service of another, can be a practising under this act.

Plaintiff nonsuited.

Clarkson, for the plaintiff. Gurney, for the defendant.

[Attornies-Kelyng, and Russen.]

See Walmisley v. Abbott, infra, and the notes on that case.

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*MONK v. NOYES.

Under a covenant, that the tenant "should and would substantially repair, uphold, and maintain" a house, he is bound to keep up the inside painting.

COVENANT against a tenant, for not keeping the house demised in repair. Plea—Not gualty of breaking the covenant,† and issue joined thereon.

ABBOTT, C. J., ruled, that under the words of the covenant, that the tenant "should, and would, substantially repair, uphold, and maintain the said house," the tenant was bound to keep up the painting of inner doors, inside shutters, &c.

Verdict for the plaintiff, damages, 150%

Chitty, and Steer, for the plaintiff. Gurney, for the defendant.

[Attornies-Teague, and Myers.]

fin practice we very often see this plea put on the record; it is wrong: the general issue if in covenant there can be said to be one) is non est factum: performance of a covenant seght to be pleaded specially; and, I believe, no case has occurred, where the plea of non

infregit conventionem was demurred to, in which it was not held to be bad. In Taylor v. Needham, 2 Taunt. 278, which was an action of covenant for not repairing, the Court, on this plea being demurred to, held it bad on two grounds: because it was too general, several breaches being assigned; and because the breach of it being—not repairing, two negatives would not make an issue. In several other cases, the Courts have held, that this plea is bad; however, it is good after verdict. Cowp. 588.

MARIA PEREZ COSIO & PINEYRO v. DE BERNALES, [*266

Husband and wife, trading as partners in Spain, cannot sue as such in our courts, without proof being given, that by the law of Spain a feme covert is allowed to trade. Whether on such proof an action could be maintained by both—Quere.

Assumes for money had and received. In the course of the plaintiff's case, it appeared, that the two plaintiffs were husband and wife, and that they carried on trade in Spain, as partners.

Scarlett objected that the wife ought not to have joined in the action, as she,

as a feme covert, could have no property.

ABBOTT, C. J. The plaintiff must give some evidence, that, by the law of Spain, a feme covert in that country is authorized to have separate property, and trade on her own account.

The plaintiffs' counsel not having any such proof,

ABBOTT, C. J., held, that the plaintiffs must be nonsuited, because he could not presume, that a *feme covert*, in *Spain*, could engage in trade; and as these parties sued in an *English* court, they were bound to show, that they had put a proper plaintiff on the record, according to the law of *Spain*, before the question could be raised, whether husband and wife, being partners in trade, in *Spain*, could sue as such in our courts. A *feme covert* carrying on business as a sole trader, in the city of *London*, may, by the custom of *London*, sue in the city courts, but not in these courts.

Plaintiffs nonsuited.

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Gurney, and Kaye, for the plaintiffs. Scarlett, for the defendant.

[Attornies-Freshfield & K., and Leversedge.]

It is extremely probable, that when the action was brought, the plaintiffs' attorney was not aware that the two plaintiffs were husband and wife, one being named Cosio, the other Pineyro; but nothing is more common on the Continent, than for the wife not to take her husband's name, but to continue to be called by the name she bore before her marriage. It is also not unfrequent for the wife to continue to use her own christian and surname, with the addition of her husband's surname. By the custom of London, a feme covert carrying on trade in the city, without the interference of her husband, is considered in the City Courts as a sole trader; but she cannot sue in the courts at Westminster; and even in the City Courts, her husband must join in actions. In the case of Beard v. Webb, 2 Bos. & P. 98, Lord Eldon says, "This custom is one of those customs called executory customs; the meaning of which is, customs united to the courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior courts by way of bar." A wife may sue, and be sued, alone, if her husband is transported; this has long been considered as settled, as far as her power of sueing during the time the sentence is actually in operation. But the case of Carrol v. Blencow, 4 Esp. 27, carries it further—This was an action for goods sold. The defence was, the coverture of the plaintiff. The plaintiff's counsel put in the record of the husband's conviction of a felony, in Marck, 1794, when he was sentenced to seven years' transportation. On this, it was objected, that the term of transportation had elapsed (the trial being on the 3d of June, 1801,) and, therefore, that the husband was competent to sue; but Lord Alvanley, C. J., ruled, that the record gave the wife a right to sue, as a feshe sole, and that such right remained till the husband's return; and that though the term of transportation was expired, yet, if the defendant meant to rely on the fact of the

husband having actually returned, the defendant must show that by evidence. We stick evidence being given, there was a verdict for the plaintiff. Another case in which a fisme covert may sue, and be sued, as a feme sele, is, where her husband, being an alien, is abroad, and has deserted his wife; but in Kay v. The Duckess de Pienne, 3 Camp. 123, Lord Ellesboragh seems to confine this to cases where the husband has never been in this country. But in the cases of husbands, who are Englishmen, going abroad, and deserting their wives, it appears, that the wife cannot be sued, as feme sole. In Marsh v. Hutchisson, 2 Bos. & Pul. 226, which was an action for goods sold; the defendant's basband was agent for the English Packets, at Brill, in Holland, and on the invasion of that country by the French, in 1795, sent his wife to this country, he himself remaining is Helland. Heath, J., says: there is a great difference between an Englishman going abroad, and leaving his wife in this country, and a foreigner doing so. The former may be compelled to return, at any time, by the king's privy seel. There is not any case, where the wife has been holden liable, the husband being an Englishman. And in Begges v Frier, 11 East, 301, it was held, that in the case of an Englishman, no absence, except on something in the nature of a civil death, gave the wife the character of a feme sole. In general, where the cause of action would survive to the wife, she must join in the action; but in actions for goods sold, or money lent, during coverture, the husband must see alone, as the wife could have no property in the goods or money.

*268] *COURT OF COMMON PLEAS.

SITTINGS IN EASTER TERM, AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE BEST.

CAMERON v. BAKER.

An attorney being employed for a man by his father, to defend an action; if he knew of his retainer, and did not disapprove of it, he is bound by the acts of such attorney, in the same way as if he had himself employed him. If the father of an illegitimate child consents to pay an annual sum for its support, he will be bound to continue to do so, er to provide for the child himself, or to give the most distinct notice of his intention to pay such annual sum no longer.

Assumer on the common counts. This action was brought to recover a compensation for the maintenance and education of the illegitimate child of the defendant.

The plaintiff had married the mother of the child, and the defendant was its reputed father. It appeared that legal proceedings had been commenced against the defendant for seduction. The defendant's father employed are attorney to conduct his defence; the defendant knew of this and did not disapprove of it.

Pell, Serjt., objected that what the attorney so employed did, would not bind the defendant.

*BEST, C. J. If he knew of the attorney being employed for him, and did not disapprove of it, the acts of the attorney are evidence.

The attorney stated that it was agreed that the action for seduction should be compromised, on the defendant allowing 20% a-year for the maintenance of the child.

Witnesses proved that the plaintiff maintained and educated the child, at a much higher expense than 201. a-year.

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Base, C. J. Should you not show some authority from the defendant?

Wilde. We shall show that he has paid 20L a-year, and on the authority of the case of Heskett v. Going, 5 Esp. Rep. 131,† he must continue to do so, unless something has been done to put an end to that arrangement.

A witness proved receiving 5l. per quarter from the defendant for the

child's maintenance.

BEST, C. J. The father of an illegitimate child is not in the first instance bound to maintain it, unless compelled to do so by an order of magistrates; but if he consents to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give the most distinct notice of his intention to pay such annual sum no longer.

Verdict for the plaintiff, for 20%.

Vaughan, Serjt., and Wilde, for the plaintiff.

Pell, Serit., for the defendant.

[Attornies-Freeman, and Leigh.]

† The case of Heskett v. Going, 5 Esp. 131, was an action of assumpsit for the board and lodging of the defendant's illegitimate female child. The child had been nursed at the plaintiff's house, and frequently visited there by the defendant. The defence was, that no order of filiation had been made by any magistrates; and that, though the plaintiff had formerly kept the child by the defendant's consent, the defendant had since taken the child to his own house, whence she was taken back to the plaintiff's by her mother. It however appeared that the defendant knew of the child's being so taken back, and had taken no steps to get her away again. Lord Ellenborough ruled, that the father of an illegitimate child was liable to pay for the nursing and board of such child, if he has adopted it as his own, and acquiesced in its being disposed of in any particular way. If he took it away, he had a right to keep it in his own care; and if the mother took it away, and put it to a person to nurse, without his consent, that person could not charge the father, as he could only be charged on his own contract: but here the child was taken back to a place where the defendant knew it had been before, and if the jury thought he sequiesced in the child's continuing there, he returned to his former liability. The jury found for the plaintiff.

JENKINS v. SLADE.

A certificated conveyancer can maintain no action for his fees.

'Assumpsit for work and labor, as a certificated conveyancer, with the common counts.

The plaintiff's clerk proved that the conveyancing was done by the plaintiff, who was a certificated conveyancer, to the amount of 18*l.*; and that 2*l.* 4s. 6d. had been paid by the plaintiff to a barrister for settling one of the drafts; and 4*l.* 16s. 6d. to a law stationer for engrossing them.

There was no defence.

BEST, C. J. I am of opinion that a certificated conveyancer can maintain no action for his fees. How can any *jury say what his labor is worth? What the plaintiff has paid out of pocket he may recover, but not his own fees.

Verdict for the plaintiff.—Damages, 71.
Vaughan, Serjt., and Justice, for the plaintiff.

[Attornies—Taylor, and Richardson.]

SITTINGS IN EASTER TERM, IN LONDON.

BEFORE LORD CHIEF JUSTICE BEST.

SMITH v. HENRIETTA MAXWELL.

A marriage in *Ireland* by a clergyman of the established church is good, though it takes place in a private room, without any special license.

Thus was an action against the defendant as acceptor of a bill of exchange. The formal proof on the part of the plaintiff was given.

The defence was the coverture of the defendant.

To establish this a witness was called, who stated that he was present when the defendant was married to Major Maxwell, at Ballinrow, in Ireland, by a gentleman who had officiated for many years as curate of that place. That the family were all present, and the ceremony was performed in a private room, it being the custom for persons of respectability in Ireland to have it performed in that manner.

For the plaintiff it was submitted, that this was not sufficient evidence of a

legal marriage.

BEST, C. J. In this country it would not do without a *special license; but in *Ireland*, if the ceremony is performed by a clergyman of the established church, it is quite sufficient, though not in a church.

The daughter of the defendant was then called, and proved that her father and mother lived together till within the last five years, and that she saw her father a few days previous to the trial.

The jury then, under his Lordship's direction, found a verdict for the

efendant

Vaughan, and Taddy, Serjts., for the plaintiff. Pell, and Firth, Serjts., for the defendant.

[Attornies—Holt, and Jacques & B.]

NICHOLLE v. PLUME.

The acceptance of goods by the buyer, if they are above 101. value, and there has been no written memorandum of the contract, under the statute of frauds, must be clear and unequivocal; and the Court won't allow a constructive acceptance to be sufficient.

This was an action for the price of a quantity of cider supplied by the plaintiff, on the verbal order of the defendant.

A witness proved his being present at the defendant's, when the bargain was made, and that the cider was good cider for the price. It was sent by the wagon to the defendant, who refused to take it in; but caused it to be lodged in a warehouse near his premises, but not belonging to him. It was not returned to the plaintiff, nor did the defendant send any notice to the plaintiff of his intention not to use the cider.

Taddy, for the defendant, submitted, that the plaintiff must be nonsuited, there being no acceptance, and no *contract in writing, to take the case out of the statute of frauds.

Vaughan and Pell, for the plaintiff, contended, that as the defendant had contracted for the cider, and it was in consequence forwarded to him by the wagon, that was sufficient; and particularly as he did not send notice to the plaintiff of his refusal to accept it.

BEST, C. J. There must be an unequivocal acceptance. The Court of King's Bench have so determined in the case of *Hanson* v. *Armitage*, 1 Dow.

& Ry. 128.†

Nonsuit.

Vaughan and Pell, Serjts., for the plaintiff. Tuddy, Serjt., for the defendant.

[Attornies—Bennett and Chilton.]

† In the case of Hanson v. Armitage, the defendant, a grocer in Yorkshire, had ordered two chests of tea of the plaintiff, a tea-dealer in London. The teas were forwarded to Stanton's wharf, to be sent by eea: and, on the voyage, the vessel in which they were was lost. No evidence was given, to show whether the order was written or by parol; but it was proved, that goods which had been before sent to the defendant had been received for him at that wharf. The invoice was not sent till after the loss of the ship was known. It was objected, that there was no sufficient delivery or acceptance, to take this out of tha statute of frauds. The Court, after taking time to consider of their judgment, thought it was best to adhere to the strict and express words of the 17th section of this statute. The words require an acceptance by the party himself, and the Court thought it would not be right to suffer any constructive acceptance to satisfy its provisions, in the absence of an express contract in writing. The words of this section of the statute of frauds (29 Car. 2, c. 3) are:—''No contract for the sale of any goods, wares, and merchandises, for the price of ten pounds or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some pote or memorandum in writing, of the said bargain, be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

*BENNETT et al., Assignees of HALL, v. SPACKMAN. [*274

A bill of exchange given in payment to a person who becomes bankrupt, is a good payment, though the bill does not become payable till after the bankruptcy, if the party paying did not know of the insolvency of the bankrupt.

Assumest to recover money expended by the bankrupt for the defendant, in the erection of several houses.

The act of bankruptcy was committed on the 27th of February, 1823.

To cut down the demand, several bills of exchange were given in evidence, and among the latter, a bill dated *December* 11th, 1822, at four months from the date, was offered.

Pell, for the plaintiffs, objected. This bill became due on the 14th of April, 1823, which was after the act of bankruptcy, therefore it cannot be admitted.

BEST, C. J. It is receivable in evidence; because it is a good payment, unless it was made with a knowledge of the insolvency of the bankrupt; and it will be for the jury to say whether it was so made or not.

Vaughan, for the defendant, then asked the bankrupt, what he did with the bill when he received it, and was answered, that he indorsed it immediately to a person who was waiting for it at the time.

BEST, C. J., upon this was of opinion, that it must be considered as a pay-

ment made to a bankrupt on the day when it was drawn, as he had paid it away then; and that day being before the act of bankruptcy, the payment was a good payment.

Verdict for the plaintiff, for the balance Pell and D. F. Jones, for the plaintiffs. Voughan, Serjt., and Hutchinson, for the defendant.

[Attornies-Maugham and Rigby.]

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*FROMONT v. COUPLAND.

In an action for use and occupation of stables, the plaintiff and defendant having formerly an action for use and occupation of statics, the plaintin and detendant naving formerly been connected in a stage coach concern, weekly accounts delivered by the plaintiff to the defendant, by which it appeared that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the week, are not evidence of proper matter of set off. To become matter of set off, the balance in the partnership account must be final.

Action for use and occupation of stables. Plea-General issue; with notice of set off.

The plaintiff and defendant had been connected in the proprietorship of a Bath stage-coach. Each of them ran the coach a certain part of the journey, and provided all that was necessary for that part. The plaintiff retired from the concern, and the defendant took his stables, and it was for the rent of them that the action was brought.

It appeared that the plaintiff by his agent received all the profits, and had to divide them between the parties, according to the distance each ran the coach.

Accounts were rendered every week by the plaintiff to the defendant, which contained a statement of the receipts and disbursements during the week, and the proportion due to the plaintiff and defendant, for the number of miles that each ran the coach.

These accounts the defendant offered as evidence of a set off; and it was acknowledged, that if they were received, they would show a balance in favor of the defendant.

It appeared that there were other general accounts between them as partners. BEST, C. J., directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit, by introducing the accounts as a set off.

Vaughan, Serjt., and Chitty, for the plaintiff. Pell, and Wilde, Serits., for the defendant.

[Attornies—Hurst and Pearson.]

*In Trinity Term, Pell moved to enter a nonsuit, pursuant to the leave given at the trial, arguing that the plaintiff and defendant were not partners in the general concern, because each had a distinct share in the profit and loss. According to these accounts the plaintiff had a part and the defendant a part, and the plaintiff had in his hands the portion due to the defendant.

Bast, C. J. Is that any thing more than a mode of dividing the profits?

These weekly accounts do not show a general balance; there may be actions to be brought, and the balance cannot be ascertained till they are decided.

Pell. Non constat, but the other accounts spoken of were in favor of the

defendant.

He submitted, First, that these parties were not partners in the general concern; or, Secondly, if they were, that these were accounts settled: in either of which cases they might be received in evidence, and he cited Barton & Hanson, 2 Taunt. 49; Smith & Barrow, 2 T. R. 476; and Rackstraw & Imber, Holt, N. P. C. 368.

BEST, C. J. I am clearly of opinion on principle, that these accounts are not properly a set off. Undoubtedly these persons are partners: they are engaged in carrying passengers; they receive a certain sum, and are answerable to the public. The balance struck must be on the final adjustment of the partnership accounts; but in these accounts there is no such balance, for it is proved that there are other general accounts. Actions might be brought for damage to goods, &c., which would go to reduce the general yearly accounts, and therefore it would be great injustice to make these weekly ones decisive. Unless we were to hold that an action might be brought by *one partner against another, on every settled item, we cannot say that these **expectation**

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weekly accounts are proper matter of set off.

Rule refused.

SITTINGS IN EASTER TERM, IN LONDON.

BEFORE LORD CHIEF JUSTICE BEST.

EVANS v. SWEET.

The issue that R. and Y. became bail, at the request of the sheriff, is proved by showing that they became bail at the request of the sheriff's officer, to prevent the sheriff from being fixed.

Acrion for false imprisonment, in which the question intended to be tried, was, whether the sheriff can by law put in bail to render a party, without or against the consent of the party so rendered. But it was found, on examining the pleadings, which were very long, that the only issue on the record was, that by the rejoinder it was alleged, that two persons, named *Rickerby* and *Young*, became bail, at the request of the sheriff; and in the surrejoinder, the plaintiff denied this, and issue was therefore joined on the fact of request or no request of the sheriff.

It was clearly proved, that these persons became bail at the request of the sheriff's officer, and that he got them to become bail to render, to prevent the sheriff from being fixed, and himself from ultimately being compelled to pay

the debt.

Cross, Serjt., and Thessiger, contended, that this did not prove an authority from the sheriff to put in bail; because, though the under-sheriff is the general

officer of the sheriff, and his acts are the acts of the sheriff, yet with the bailiff it is otherwise.

BEST, C. J. I am clearly of opinion, that the officer, in *this instance, acted for the sheriff, and that his request is the request of the sheriff. I must nonsuit the plaintiff.

Nonsuit.

Cross, Serjt., and Thessiger, for the plaintiff.
Pell, and Wilde, Serjts., and Wightman, for the defendant.

[Attornies-Pilcher, and Wheeler.]

Pell, Serjt., obtained a rule nisi, for a new trial; but on cause being shown, the Court were clearly of opinion that the nonsuit was right. The rule for a new trial was therefore discharged.

SITTINGS AFTER EASTER TERM, AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE BEST.

DIXON v. VALE et al.

If a witness, being cautioned that he is not obliged to answer questions which tend to criminate him, still does answer such questions, he cannot afterwards take the objection to any further question, relative to that whole transaction.

Assault and battery. Plea—General issue; 2d, Molliter manus; and 3d, That the plaintiff attempted to make a forcible entry into the house of one of the defendants, and that he, assisted by the others, as his servants, repelled such attempt, using no more force than was absolutely necessary. Replication—De injuria.

One of the plaintiff's witnesses, in his cross-examination, stated, that he had become bankrupt; and *Peake* asked him as to the removal of certain goods, which had been taken from his house after his bankruptcy.

BEST, C. J., told him he was not bound to answer this, as it might criminate him.

*279] The witness said he had no objection to answering, when—BEST, C. J., laid down, that if a witness, being cautioned that he is not compellable to answer a question that may criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction, and cannot be allowed to object, that any further question has a tendency to criminate him.

The justification having been proved, there was a

Verdict for the defendant.

Vaughan and Pell, Serjts., and F. Pollock, for the plaintiff. Peake, Serjt., for the defendants.

[Attornies—Watson & B., and Richardson.]

SITTINGS AFTER EASTER TERM, IN LONDON.

BEFORE LORD CHIEF JUSTICE BEST.

SIMS v. KINDER.

Blander.—If the plaintiff has applied to the under-sheriff of Middlesex to appoint him a sheriff's officer, and, in answer to the inquiries of the under-sheriff as to his fitness, the defendant, another officer, to whom the plaintiff had been a bailiff's follower, says he robbed him: such communication is confidential, and is as much privileged as the communication of a master in giving a character to a servant; and in such a case it is competent to the master, under the general issue, to put in proof any part which goes to show, that, in making the slanderous assertions, he was not actuated by malice.

SLANDER. The declaration stated a colloquium between the defendant and Benjamin Hopkinson: That the *defendant said of the plaintiff, "he is a rogue and a thief, and has robbed me:" and, as special damage, it [*280 was laid, that Benjamin Hopkinson, being the under-sheriff of Middlesex, would have nominated him a sheriff's officer, but by reason of these words, he refused to do so, whereby the plaintiff lost great gains, which would have accrued to him by sucn nomination.

The defendant pleaded, first the general issue; and second, a justification which stated that the plaintiff, having been servant of the defendant, during the time of such service, received sums of money, w wit, 8i. 13s. 6d., for and on account of the defendant, his master, from J. H., G. S., J. B., and C. B., which said sums the defendant wrongfully and dishonestly secreted and embezgled; wherefore the defendant spoke the words, &c., as he lawfully might, &c.

Replication—De injuria.

From the evidence of Mr. Hopkinson, the under-sheriff, it appeared that the defendant had been for many years a sheriff's officer, and that the plaintiff, who had been his follower, had sent an applicatiou to the sheriff's office to be appointed a sheriff's officer. The under-sheriff saw a person named Crook, of whom he made inquiries, and on seeing the defendant, said, Crook tells me that Sims, who formerly lived with you, is a thief, and has robbed you many times; on which the defendant replied, "what Crook has told you is very true." And the under-sheriff further stated, that he made these inquiries for the purpose of ascertaining whether the plaintiff was a fit person to be appointed an officer; and in consequence of what the defendant said, he refused to appoint the plaintiff.

Several witnesses proved that they were attornies, and would have employed

the plaintiff, had he succeeded in getting the appointment.

The defence was, first, that this was a confidential communication, and therefore no action could be maintained for any slander it might contain, unless the defendant spoke the slander from malicious motive; and it was *likened to the case of giving a character to a servant; and second, that the facts

stated in the plea were a justification of the words.

Witnesses proved that the plaintiff had received sums of money for his omitting to arrest one of the persons named in the justification, a warrant for such arrest having been given to the defendant; and the niece of the defendant proved, that when charged with having kept the moneys of the defendant, the plaintiff said he was sorry for it, and must work it out.

The defendant's counsel wished to give in evidence, that other sums of money had been received by the plaintiff, of persons who were not mentioned

in the plea.

Taddy, Serjt., objected, that as the plea only justified the slander, because the plaintiff had kept money paid him by some particular persons, the defendant

could not give other transactions of the same kind in evidence.

BEST, C. J. I am clearly of opinion, that this conversation with the undersheriff was confidential, and entitled to just the same protection as communications relative to the character of servants; and therefore, as words spoken under such circumstances are not actionable without malice, on the question of malice or no malice, I am clearly of opinion, that any fact which goes to show that the defendant spoke bona fide, and without malice, is admissible in evidence; and further, that it is admissible on the general issue.

The plaintiff was nonsuited.

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*Taddy, Serjt., and Adolphus, for the plaintiff.

Vaughan, and Pell, Serjts., and Comyn, for the defendant.

[Attornies—Brooks, and Platt.]

In the case of Rogers v. Sir Gereas Clifton, 3 Bos. & Pul., Chambre, J., says, "I take the law to be well settled, that where a master is applied to for the character of a servant, the former is not called upon in an action, to prove the truth of any aspersions thrown out by him against the latter; but that it lies upon the servant to prove the falsehood of such aspersions; and in such case the master is justified, unless the servant proves express malice." And in the case of Swatton v. Tarpley, K. B., Mich. T. 1821, (MS.,) the Courtbeld, that a servant could maintain no action for any thing said by a master, in giving a character, whether in writing or otherwise, unless there be malice; but that malice might either be shown from the communication itself or from matter dehors, and that if there were no evidence of malice, the judge should nonsuit; but if there were any evidence of malice, the case should go to the jury on the question of malice or no malice. In the case of Carrol v. Bird, 3 Esp. 201, Lord Kenyon laid down, that a servant could bring no action against his master for not giving him a character.

PARKINS v. COBBETT.

Beidence.—To let in secondary evidence, the best evidence of loss of the original document, that the case admits of, ought to be given. If a party has delivered over a letter to his daughter, and previous to the trial a witness has made diligent search for it, assisted by the daughter, and could not find it; this is not sufficient evidence of loss, to let in proof of its contents without calling the daughter. But if the party had kept it m his own custody, and had set a person to search, who could not find it in any of the places where letters were kept, that would be sufficient.

Across to recover the price of a horse, sold by the plaintiff to the defendant. The defence was, that the horse was not sold, but only lent to the defendant; and to show this, it was sought to give parol evidence of the contents of a Vos. XII.—22

170 Doe Dem. Bulkeley v. Wilford. E. T. 1824. [282

letter sent by the plaintiff to the defendant. To prove the loss of the original letter, the defendant's son proved, that as soon as the defendant received it, he gave it to his daughter to take care of, as was his practice with all his letters; and that two days before the trial, the witness and his sister searched in all the places where the defendant's letters were kept, but could not find the letter in question.

Vaughan, Serjt., objected, that this was not sufficient evidence of [283]

the loss of the letter: the defendant's daughter ought to be called.

Pell, Serjt., and D. F. Jones, contended, that all that was ever required was reasonable proof of loss; and if a search was made in all places where letters

were kept, that was sufficient prima facie proof of loss.

BEST, C. J. You must, in all cases, give the best evidence of the loss of the original writing that the case admits of. If this letter had not been traced to the defendant's daughter, evidence that the defendant had employed the winess to search in all places where he kept letters, would, I take it, have been sufficient prima facie evidence of loss, to let in secondary evidence of the contents of this letter; because no better evidence could be reasonably expected to be given; but here it is traced to the defendant's daughter, and therefore she must be called; and if she is not, secondary evidence cannot be given of the contents.

The defendant's daughter not being in court, was of course not called, and the evidence was rejected.

Verdict for the plaintiff.

Vaughan, Serjt., and Cooper, for the plaintiff. Pell, Serjt, and D. F. Jones, for the defendant.

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[Attornies—Duncombe, and Faithful.]

*ADJ. SITTINGS AFTER EASTER TERM, AT WESTM. [*284

BEFORD LORD CHIEF JUSTICE BEST.

DOE, on the Demise of BULKELEY, v. WILFORD.

If in a fine there be a patent ambiguity, the fine is void; but if there is a latent ambiguity, it may be explained by evidence. If a fine is levied of twelve houses, it revokes a previous will quead those houses; but evidence may be given to show that the conusor had nineteen houses, and that a particular twelve were meant by the fine.

EJECTMENT to recover houses and lands at Chelsea. The lessor of the plaintiff was the heir at law of General Wilford; the defendant was the widow of

the General, and devisee of all his property under his will.

It appeared that General Wilford had made a will, by which he devised the whole of his property to his widow, the defendant; but subsequently to the execution of his will, he sold a small portion of a property he had, which was called the Ranelagh property, to the Governors of Chelsea Hospital. Their solicitor not approving the title as it then stood, General Wilford levied a fine of "twelve messuages, twelve gardens, twenty acres of meadow, with the ap-

purtenances, &c., in the parish of *Chelsea*." There was no deed to lead the uses of this fine, and it was therefore contended, on the part of the lessor of

the plaintiff, that this fine revoked the will.

To show that this fine did not extend to all the General's property in Chelsea, evidence was given that he had nineteen houses in Chelsea, but twelve of them were in the Ranelagh property; and a deed, dated 12th August, 1820. was put in. It was between General Wilford and the Governors of Chelsea Hospital. It recited that General Wilford had contracted for the sale of a part of a certain estate, called the Ranelagh property, to the Governors of Chelsea Hospital; and in this deed was a covenant that General Wilford should levy a fine, to complete the *title of the Governors of the Hospital to the portion of his lands so purchased.

Onslow, Serjt., objected, that this deed was not evidence; for that this was not a case between the General and the Governors of the Hospital, therefore

this deed was a mere res inter alios.

BEST, C. J. If the fine was clear, and free from ambiguity, this deed would not be evidence; but there is an ambiguity in this fine, for it speaks of twelve houses in *Chelsea*, and there were nineteen: it is therefore ambiguous and uncertain which twelve were meant; this must be explained: therefore I think this deed admissible in evidence.

Onslow, Serjt.—My Lord, in the case of Lord Blaney v. Lord Mahon, in Viner, it was held, that if a fine is levied of twenty acres of land in D., and the conusor have more, the conusee may elect which twenty he will have.

BEST, C. J. I should like that case to be reconsidered; but I am clearly of opinion, that you cannot recover the whole of the property. If there be a patent ambiguity in a fine, it is void; but if the ambiguity be latent, you must go into evidence to explain it. The fine is for twelve houses; and if the General had had only twelve, I could have received no other evidence; and if the fine had even been obtained by fraud, that could not have been gone into in this case: the party must have gone into Equity, and even there, the fine would not have been set aside, but a re-conveyance would be ordered; and it is quite right it should be so, for if it were otherwise, it would shake the titles of a great many estates. There is no doubt, that if a party make a will, and afterwards levy a fine, that revokes the will as to all such estates as the fine extends to, though the party had no intention of revoking his will, and though he takes the same quantity of estate after the fine as he had before. On this evidence, I think it is plain the fine was of the Ranelagh property only: so far, the will is revoked, and no further.

Verdict for the lessor of the plaintiff, for the Ranelagh property. Onslow, and Pell, Serjts., and Reader, for the lessor of the plaintiff.

Bosanquet, and Taddy, Serjts., for the defendant.

[Attornies—Ellis & V., and Feto, A., & H.]

ADJOURNED SITTINGS AFTER EASTER TERM, IN LONDON.

BEFORE LORD CHIEF JUSTICE BEST.

TAYLOR et al. v. BOOTH.

Semble, that an averment in a declaration on a bill of exchange, drawn in Ireland, and made payable in England, treating the sum mentioned in the bill as Irish currency, and stating it to be of a certain value in lawful money of Great Britain, is material. and will prevent the plaintiff from recovering more than that sum; though, without such an averment, he would be entitled to treat the bill as for English currency. A bill drawn in Ireland for 2561. 18s. sterling, payable in England, will be taken to mean English money.

Action on a bill of exchange, drawn in Ireland, and payable in England. The sum stated in the bill was 256l. 18s. sterling, for which sum the plaintiffs

proposed to take a verdict.

Cross, Serjt., for the defendant, pointed ont an averment in the declaration, which treated that sum as Irish currency, and stated that it was of the value of 2321. 4s. of lawful money of Great Britain. He submitted, that the verdict *could not be taken for more than the smaller sum, the plaintiffs being bound by such averment. He also submitted, that, independently of the averment, the sum must be taken to be Irish currency, as it was drawn in Ireland, and stated to be for sterling.

BEST, C. J. If a man draws a bill in Ireland upon England, and states that it is for sterling money, it must be taken to mean sterling in that part of the united kingdom where it is payable: common sense will tell us this. My only difficulty is on the declaration. If there is any case where it has been holden that such an averment as is made in this case is immaterial, I should

be glad to be referred to it.

The rule in the case of Bristow and Wright, Parke, for the plaintiffs. Douglass, 665, is, that if the plaintiff does not want the allegation at all, it may

be struck out.

BEST, C. J. I will take the verdict for the smaller sum, and you may move to enter it for the larger. My present opinion is, that you cannot get rid of this averment.

Verdict for the plaintiffs, for 2321. 4s. and interest. Vaughan, Serjt., and Parke, for the plaintiff.

Cross, Serjt., for the defendant.

[Attornies—Freame & B., and Ellis & Co.]

To reduce Irish currency to its value in English money, you must deduct one-thirteenth of the sum in Irish currency, and the result in the value in English money; and if to an amount in English money you add one-twelfth, it gives the value in Irish currency.

*ALEXANDER v. BROWN.

A paper written by a party, is admissible in evidence against that party, though it is signed by a third person. If a person goes and offers a sum of money, stating how much he offers, and holding the money, twisted up in bank notes, in his hand, it is a sufficient tender; but if the sum had not been mentioned, semble, that it would not have been a good tender.

DECLARATION for goods sold and delivered to a third person at the defendant's

request. Pleas—The general issue, and a tender of 291. 19s. 8d.

For the defendant, a paper was offered in evidence, which was in the hand-writing of the plaintiff, and signed by Neave, to whom the goods (which were bricks) were delivered, for the purpose of building a factory for the defendant.

Tady, Serit., for the plaintiff, objected to its being received. It is true this is written by my elient, and signed by Neave. A clerk may write a paper, but it will not therefore fix him, because it is written for another. Neave may be called as a witness.

Best, C. J. I shall receive it, because it is written by your client. As yet, I do not know the contents: I only desire it may be read, as, if he had said any thing, I should hear it. The effect is another thing. It is new to me that what a man writes is not receivable.

Taddy, Scrit.—They offer it as an act done by Neave.

BEST, C. J. I do not receive it as such, but as a thing written by your client. The person who made the tender had two bank notes twisted up in his hand, inclosing four sovereigns and 19s. 8d. in change, making the precise sum intended to be paid. He told the plaintiff what it consisted of, but did not open it before him.

*289] *Taddy, Serjt., objected, that this was not sufficient. He ought to have shown him the money.

BEST, C. J. I am of opinion that it is sufficient. If he had not mentioned the amount, I think it would not have done.

Taddy, Serjt., and D. F. Jones, for the plaintiff. Besanquet, Serjt., and Moody, for the defendant.

[Attornies—G. Palmer, and Nind & Co.]

HARRINGTON v. FRY.

If a person sends letters to S. F., of Plymouth Dock, and receives answers to them; such asswers are admissible in evidence against a defendant, his name being S. F., and it being proved by a person who knew the principal residents of Plymouth Dock, and knew of no other person named S. F., this being considered sufficient prima facie evidence that they came from him; and if they were not of his handwriting, it lay on him to show that. A person is not liable for goods supplied for the use of a ship, unless he either is owner, or has held himself out as such, or has made an express promise to pay, or has received profit from the ship.

Acrion for goods supplied to the ship *Elizabeth*. The defendant, whose name is *Samuel Fry*, lived at *Plymouth Dock*; and a witness, named *Welsford*, who had the management of the vessel, put in two letters, stating that he believed that they came in answer to letters written by himself and sent to *Samuel Fry*, at *Plymouth Dock*. But he never saw Mr. *Fry*.

An attorney's clerk proved that he served process in this action on Samuel

Fry, of James-street, Plymouth Dock; on which Fry said "very well." The witness stated, that he knew most of the principal people there, and never heard of any other person named Fry. The defendant is a ship-owner.

It was then proposed to read the letters, as letters written by the defendant. *Pell, Serjt., for the defendant, objected. There is no evidence of these letters being in the handwriting of Fry, the defendant. *Welsford* merely proved his having written letters to a person named Fry. The plaintiff ought to have given notice to Fry to produce the letters sent to him; but he does not. He might have got witnesses to prove the handwriting of Fry; and there is no proof of acts done under this correspondence, and recognized by the writer of the letters.

Wilde, Serjt., and Bayley, on the same side. These are not foreign letters. Here is a party called from Plymouth Dock to prove service of process. The plaintiff's counsel might have offered the best evidence, namely, proof of the handwriting. It does not appear that any actual inquiry was made by the

young man who served the process.

BEST, C. J. I am clearly of opinion that these letters are admissible. It has been proved that the defendant is a ship-owner; and a witness has stated that he knows most of the principal people, and knows only one Samuel Fry among them. This I think is enough for me to presume that there is no other Samuel Fry of Plymouth Dock. I never knew notice to be given in such a case: the correspondence itself is not material. The witness Welsford says, these are the letters of a person corresponding under the name of Samuel Fry, of Plymouth Dock; and then it is proved, that there is only one person of that name there. It is open to the other side to prove that the letters are not of the handwriting of Samuel Fry, the defendant.

The letters were then read. They spoke of claims which the writer had on account of the vessel in question, and clearly showed that he considered

himself as an owner.

Welsford gave the order for the goods, stating them to *be for the owners generally, but not mentioning any names; and it did not appear that the plaintiff was at that time at all aware of the defendant's being an owner.

On account of a non-compliance with the registry acts, the bill of sale under which the defendant supposed he held his share of the ship, turned out to be a nullity. The defendant's name did not appear on the registry at *London*, the port to which the ship belonged at the time the goods were supplied; and there being no registry at *Exeter*, the place where the ship was described as being registered, in the bill of sale.

Pell, Serjt. I submit, that the defendant is entitled to a verdict. There is no evidence of any personal credit given to him by the plaintiff, and he is not the legal owner: a legal ownership can only be vested by a transfer in conformity with the register acts. And he cited Trewhella v. Rowe, 11 East, 435.

Vaughan, Serjt., for the plaintiff. The defendant believed himself to be the owner, and says so in his letters; he is, therefore, estopped from setting

up the infirmity in his legal title.

Best, C. J. If a man appears to be the owner of a ship, though he is not the legal owner, he shall not shield himself against claims like the present, by the infirmity of his title. If it were possible for this ship to be registered at Exeter, and the defendant stood on such registry at Exeter, as the owner, I should hold him liable. But the case stands on different grounds; for if the party furnishing the goods had looked at the London registry, he would have seen that the name of the defendant was not in it. The conveyance at Exeter is of no avail. The defendant fancied himself the owner, but never held himself out as such to the plaintiff; nor does it appear that the plaintiff had any idea that he was owner. It appears, *too, from the letters, that the defendant never received any of the profits of the vessel; for if he had.

I should have held him liable, however defective his title. I agree with the defendant's counsel, that the defendant can only be liable in two ways—either as legal owner, or as holding himself out as such; and I am of opinion, upon the evidence, that he is not liable in either of these ways. I think the case of Treehella v. Rove distinct from this case. His lordship then directed a

Nonsuit, with liberty to move to enter a verdict for the plaintiff.

Vaughan, Serjt., and E. Lawes, for the plaintiff.

Pell, and Wilde, Serits., and Bayley, for the defendant.

[Attornies—T. West, and Hughes & Co.]

In Trinity Term, Vaughan, Serjt., moved to enter a verdict, pursuant to the leave given at the trial. He argued, that there was a distinction between the proving the title to a ship, and the making out a charge against an owner. The only question being, whether these goods were furnished for the benefit, and on the authority of the party; if he acts as owner, and holds himself out as such, it is enough, though he has neither a legal nor an equitable title, which he admitted the defendant could not have unless the requisites of the register sets were complied with. The general object of these acts was, merely to see that foreigners have not an improper interest in British ships. With respect to the bill of sale, all the register acts say, that such as this is shall be full and void. But if a man delivers over, for a sum of money, the possession of a vessel to another, without any reference to the registry acts at all, he is liable, though he may not be able to make out a legal title. Fry gives to *Welsford an authority to order such stores and repairs as are necessary. The question is not on the point of legal ownership; but, whether the goods were furnished for the benefit, and on the authority of the defendant. And he cited the cases of Sutton v. Buck, 2 Taunton, 302; Hubbard & Johnstone, 3 Taunt. 177; and M'Ivor v. Humble, 16 East, 169.

Best, C. J. A man can only be charged for goods furnished for his ship, either on the ground of the credit being given to him personally, or of his being the owner, or of his holding himself out as the owner. Now, in this case, it is impossible to say that the defendant ever held himself out as owner. Welsford proved, that the plaintiff never knew that the defendant was owner. The contract was with the owners generally, and not with any individual. Then, was the defendant an owner? It is clear, that he was not. The bill of sale gave no interest, because it stated the registry of the ship to be at Exeter, whereas it was not, but at London. But if the defendant had appeared, at Exeter or London, on the register as owner, I should have held him liable, though there was a defect in his title. The contract was with the owners, and the plaintiff, if he had gone to the Custom House, would have seen that the defendant was not one of the owners. I am therefore clearly of opinion, that he is not liable. The credit was not personal; and the case in 11 East, is distinguishable from this.

Park and Burrough, Js., concurred.

Rule refused.

By the statutes 26 G. 3, c. 66, and 34 G. 3, c. 68, all transfers of ships, and shares in ships, must be in writing; and such writing must set out a copy of the certificate of the ship's registry, otherwise such transfer is not to be valid either in law or in equity. In the case of Larocke v. Wakeman, Peake, Rep. 140, it was ruled, that vessels employed in inland navigation are not within the register acts.

'OXFORD LENT CIRCUIT.

1824.

BEFORE MR. JUSTICE PARK, AND MR. BARON GARROW.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

BLOXSOME v. WILLIAMS.

Whether in an action for a breach of warranty of s horse, the defendant can be allowed to set up that he was a horse-dealer, and sold the horse on a Sunday, contrary to the provisions of the statute of 29 Car. 2, c. 7—Quare.

Action on the warranty of a horse.

It appeared that the plaintiff was an attorney, the defendant a horse-dealer, and that the horse was bought of the defendant by the plaintiff's son, on a Sunday, and that the horse, being warranted sound by the defendant, was unsound.

Jervis, objected, that this action could not be maintained; because, the sale of the horse being on a Sunday, and the defendant a horse-dealer, the sale was void, by the statute 29 Car. 2, c. 7, s. 1, which enacts, that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work in their calling, works of necessity or charity excepted; and that in the case of Drury v. Defontaine, 1 Taunt. 131, the Court only held, that the sale of a horse on a Sunday was not void, because it appeared that, in selling it, the vendor was not exercising his worldly calling, he not being a horse-dealer.

PARK, J. That was an action for the price of the horse. If the horse-dealer were suing for the price of the horse, the other party might say, you committed an offence by selling it on a Sunday, in the way of your calling, and the sale is void. The difficulty I feel is, whether a man can first do wrong by using his trade on a Sunday, and then take advantage of the wrong he has done, by annulling the sales if they don't suit him.

Verdict for the plaintiff, with liberty to move to enter a nonsuit.

Taunton, for the plaintiff.

Jervis, and Cross, for the defendant.

[Attornies—Bloxsome, and Ward.]

In Easter Term, Jervis moved for a rule nisi, to enter a nonsuit, which was granted.

OXFORD ASSIZES.

BEFORE MR. BARON GARROW.

WEAVER v. LLOYD.

If a libel is justified as true, and in the plea each specific statement is avarred to be true:
if the defendant does not prove each statement to be true, the plea is not proved, though
he prove facts of the same kind.

he prove facts of the same kind.

In an action for a libel, if a letter of the defendant is read, which refers to an account of the transaction the libel relates to, which has appeared in a newspaper, that newspaper may be given in evidence.

This was an action for a libel published in the Oxford Herald, imputing to the plaintiff that he had cruelly *beaten his horse, and knocked out one of its eyes. The defendant pleaded, First, the general issue; Second, a justification of the truth of all the things stated in the libel; and Third, another justification, which merely alleged that the statements of the libel were "true in substance."

The manuscript of the libel was proved to be of the defendant's handwriting, and read.

A letter from the defendant to the editor of the Oxford Herald was read; it referred to another account of the beating of the horse, which had appeared in that paper.

The plaintiff's counsel wished to read the account so referred to from the Oxford Herald.—This was objected to.

GARROW, B., held, that the account so referred to by the defendant in his letter was admissible in evidence.

It was read from the Oxford Herald.

Evidence was given on the part of the plaintiff, to show the falsehood of the statements of the libel, and on the part of the defendant, to show that the libel was a fair account of what occurred.

It was admitted on all hands that the statement, that the horse's eye was knocked out, was untrue; but that in other respects the libel was a fair account of what had occurred.

The jury found for the plaintiff, damages one farthing, on the general issue; for the plaintiff on the first justification; and for the defendant on the second justification.

*297] *Jervis, Peake, Serjt., and Cross, for the plaintiff.
Taunton, Russel, and Bicheno, for the defendant.

[Attornies—Frankum and Lloyd.]

† This justification, I apprehend, is not good. The case of J. Anson v. Stuart, 1 T. R. 748, decides, that if a libel charges the plaintiff with an offence, as that he is a swindler, it is not sufficient to plead that he is so; but the defendant must set forth the specific facts be means to prove, to show that the plaintiff is so. And the case of Holmes v. Catesby, 1 Taunt. 543, decides, that a justication of a libel must state issuable facts; and a justication of a libel, in the terms of such libel, is not sufficient, if the libel only charges the plaintiff with general misconduct as an attorney, or the like.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J3

In Banc.

Taunton moved (with leave of the learned baron) to enter a verdict for the defendant on the first justification, on the ground that that plea was proved in substance; and though he admitted that the beating the horse's eye out was not proved, yet, as the general charge of the libel was cruelty to the horse, that was abundantly proved, though each specific fact of cruelty was not proved.

The Court were clearly of opinion, that if a libel charges specific facts of cruelty, and those statements are justified as true, each specific fact of cruelty must be proved, to support the justification.

Rule refused.

WORCESTER ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. CALEB TANDY.

To constitute the offence of breaking into a dwelling-house in the day-time, (no person being therein,) it must be proved, that the breaking took place at a time of day when there was sufficient daylight to distinguish a person's features.

This prisoner was indicted under the statute of 39 Eliz. c. 15, for breaking into a dwelling-house, no person being *therein, and stealing goods, to the value of five shillings and more.

The prosecutor proved, that when he left his house to go to work, no person was in it, and that he left it securely fastened; when he returned, he discovered that it had been broken open, and goods stolen of more than 5s. value; it was then so dark that a person could not distinguish a man's features.

PARE, J., laid down, that this offence was the converse of burglary, and that, to constitute the offence, it must be proved that the house was broken into at a time when there is light enough to distinguish a man's features.

Evidence was then given, to show that the prisoner was in possession of the stolen goods before dark.

Verdict-Guilty.

REX v. GEORGE GRIFFITH.

To constitute the offence of cutting, with intent to murder, it is not necessary that the wound should be near a vital part, or of such a nature as to be likely to cause death.

This prisoner was indicted for cutting and stabbing Edward Penny, with intent to murder him: other counts charged it to be with intent to main.

disable, and disfigure him, and with intent to do him some grievous bodily harm.

Evidence having been given of the circumstances,—

Godson asked the surgeon who attended the prosecutor, whether the wound was near any vital part, or was of a dangerous nature, likely to cause death.

PARK, J. I think that question quite superfluous; the *situation of the wound on this indictment is immaterial; all that we can inquire is, whether the prisoner cut or stabbed the prosecutor with either of the intents laid in the indictment, and whether, if death had ensued, the offence would have been murder. I know, some judges have held, that to constitute this offence, the wound must be of such a nature as is likely to cause death. However, till the House of Lords have decided that that is law, I shall hold the contrary opinion.

From the other evidence it appeared, that, if death had ensued, the offence

would only have amounted to manslaughter.

Verdict-Not guilty.

*Godson, for the prosecution. Curwood, for the prisoner.

[Attornies—Godson, and ——.]

The stat. 43 Geo. 3, c. 58, (Lord Ellenborough's act) enacts, that "if any person or persons shall wilfully, maliciously, or unlawfully stab or cut any of his Majesty's subjects, with intent, in so doing, or by means thereof, to murder or rob, or to maim, disfigure, or disable such of his Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his Majesty's subject or subjects, or to prevent apprehension; such persons are declared felons, without benefit of clergy. Provided always, that in case death had ensued, it would not have amounted to murder, the party stabbing or cutting shall be acquitted." The above is the clause in the statute, in which there is nothing which makes it necessary to show that the wound was near a vital part, or of a dangerous nature; but in practice I have known judges direct an acquittal where the wound has been of such a kind, that it was quite impossible that it could cause death. The first case of this kind, that I remember, was at the Old Bailey, a few years ago, where, in a scuffle in the street, a watchman got his finger cut by a knife that the prisoner had in his hand. The judges held, that this was not within the act, as the wound was of such a nature, that death would not ensue from it. In another case, at the Worcester Spring Assizes, 1823, where, in an alebouse quarrel, the prisoner had such the prosecutor with a knife; on the surgeon proving that the cut, which was inflicted over the prosecutor with a knife; on the surgeon proving that the cut, which was inflicted over the prosecutor with a knife; on the surgeon amain's cutting himself in shaving," Best, J., held, that the prisoner must be acquitted, on account of the utter insignificance of the injury. And in the case of Rev v. Akenhead, Holt.

N. P. C. 469, the prisoner was indicted under this act, for cutting the prosecutor across the shoulder in a sudden quarrel. Bayley. J., entertained doubts. The wound was not in a vital part, and had death ensued, it would only have been manslaugh

REX v. JOSEPH PERKES.

It is a sufficient breaking to constitute the crime of burglary, if a party breaks a pane of glass of a window, and puts his hand in for the purpose of opening the shutter, though he cannot succeed in doing so.

This prisoner was indicted for burglariously breaking and entering the dwelling-house of William Hemming, with intent to steal his goods.

It was proved, that the prisoner broke the glass of one of the windows, and put in his hand to open the shutter, which he could not succeed in doing.

PARK, J., held this to be clearly a burglary.

Verdict-Guilty.

Mr. Justice Foster, speaking of burglarious entry, at page 108 of his work on the criminal law, lays down, that "if any part of the body be within the house, hand or foot, this. at common law, is sufficient." Putting a hook or other instrument into the house, to reach the goods in a house, has been held a sufficient entry. But in Hugher's case, 1 Leach, 406, where the prisoner had bored a hole in a door with a centre-bit, and some of the borings had fallen on the inside, from which it was wished to be inferred that the point of the centre-bit had been within the house; it was held that this was not a sufficient entry to constitute a burglary. In Roberts', alias Chambers', case, 2 Ea. P. C. 487, where a glass window was broken, and the window opened with the hand, but the inside shutters were not broken; it was ruled by Ward, C. B., Powis & Tracy, Js., and the Recorder, to be a burglary; but they thought this the extremity of the law; and, on a subsequent conference, Holt, C. J., and Powell, J., doubting, and inclining to another opinion, no judgment was given. I have been informed, that within these few years, a similar case being tried before Dallas, C. J., his lordship held, that it was not a burglary; because the breaking the window was only with intent to open the shutter, and not with intent to steal any thing. It seems, however, pretty clear, that though the intent was to open the shutter, yet the prisoner had also the intent to rob the house.

*STAFFORD ASSIZES.

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BEFORE MR. BARON GARROW.

REX v. WILLIAM LLOYD.

An indictment for manslaughter, charging, that the prisoner "did compel and force A. B. and C. D. who were working at a certain windlass, to leave the said windlass, and by such compulsion and force. &c. the deceased was killed:" is not supported by evidence, that the prisoner was working the windlass with A. B. & C. D.; and that by his going away they were not strong enough to work it, and so they let it go; because the words "compel and force," must be taken to mean active force.

This prisoner was indicted for manslaughter.

The indictment stated, that the deceased being in a coal pit, and the prisoner well knowing that a certain windlass, at the top of the pit, required a considerable number of men to work it; and that the prisoner "did compel and force A. B. and C. D., who were working at the said windlass, to leave the said windlass, and, by such compulsion and force," the said A. B. and C. D. were obliged to desist from working at it, by means of which, a bucket, *at-tached by a rope to the windlass, fell on the head of the deceased.

From the evidence, it appeared, that the deceased was in the pit, and that the prisoner was working one handle of the windlass, while A. B. and C. D. worked the other. The prisoner went away, and left the handle he worked at, when the two men, finding that they were not strong enough to hold the windlass without him, let go their hold, by reason of which, the bucket fell to the bottom of the pit, struck the deceased on the head, and killed him.

C. Phillips objected, that this evidence did not support the indictment.

Garrow, B. I am clearly of opinion, that the words, "did compel and force," must be taken to mean, personal affirmative force applied to those men who worked at the windlass. The prisoner must be acquitted.

Verdict-Not guilty.

Corbet, for the prosecution. C. Phillips, for the prisoner.

BRASSINGTON et al. v. AULT.

If two persons, who are executors jointly with a third person, bring an action in their own persons, and not as executors, on a contract made with those two, the third having taken no part in the making of the contract: such action can be maintained by those two, without the third joining.

Assumestr for goods sold.

It appeared, that the plaintiffs, and a person named Saunders, were the executors of a timber merchant, and had sold timber of the testator to the defendant, but the plaintiffs did not now sue as executors. The plaintiffs had proved the will, but Saunders had not. The auctioneer stated, at the time of the sale, that the timber was sold by order of the executors.

*Taunton contended, that the plaintiffs ought to be nonsuited, because the property was vested in all the executors, and that all must join in

this action, whether they had proved the will or not.

PARK, J. As the contract was made with the plaintiffs only, and they sue individuals, I think the action is properly brought.

Verdict for the plaintiffs.

COURT OF COMMON PLEAS.

In the following Easter Term, Peake, Serjt., moved (by leave of the learned judge) to enter a nonsuit, and contended, that all the executors should have joined in the action; for, that many cases had decided, that where there were several executors, all must join in bringing actions, whether they had proved the will, or not; and further, that as the auctioneer had stated the sale to be by order of the executors, it must be taken, that all the executors directed the sale, and were, therefore, parties to it; and that, as the contract was with three persons, and two of them only sued on it, the plaintiffs ought to have been nonsuited.

The Court granted a rule nisi.

But, on cause being shown, the Court was of opinion, that the action could

be maintained in its present form, as it appeared clear, that the sale was by the plaintiffs only, and that Saunders had nothing to do with it.

If, on actions on contracts, there are parties who ought to have joined in bringing such actions, and have not, it is a ground of nonsuit at the trial on the general issue; or, if it appears on the record, it may be taken advantage of, on motion in arrest of judgment, or on writ of error: and if there are several executors, all ought to join in bringing actions, though some have not proved the will, or have even refused to act. But if, suing as executors, one only brings the action, and the others do not join, it can only be taken advantage of by plea in abatement, after oyer of the letters of administration. An executor may sue as such on contracts made with him as executor; and, indeed, in all cases, where the money recovered would be assets. It is often important for a person to sue as an executor, because, if unsuccessful, he pays no costs. In actions of assumpsit, by executors, or administrators, suing as such, if the defendant pleads the general issue, this plea admits that the plaintiffs are executors, or administrators, as stated in the declaration; and the defendant will not be allowed on this plea to dispute it.

*REX v. THOMAS GNOSIL.

[*304

To constitute the crime of highway robbery, the force used, must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property, it is not highway robbery.

This prisoner was indicted for a highway robbery.

The prosecutor proved, that as he was going along the street of *Walsal*, the prisoner laid hold of his watch chain, and, with considerable force, jerked his watch from his pocket; a scuffle then ensued, and the prisoner was secured.

Garrow, B. The mere act of taking, being forcible, will not make this offence a highway robbery: to constitute the crime of highway robbery, the force used must be either before, or at the time of the taking, and must be of such a nature, as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen. Thus, if a man walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.

Verdict-Guilty of larceny only.

*Male, for the prosecution. Curwood, for the prisoner.

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[Attornies-Wilson, and Jones.]

To constitute the crime of robbery, either the party must be put in fear, or the taking must be by violence, and it therefore becomes necessary to inquire what degree of force is necessary to constitute this offence. The sudden snatching of property from a person, is not a robbery, if there be no resistance or struggle, and no injury done to the party robbed. In Stevard's case, 2 East, P. C. 702, the prisoner had pulled off a gentleman's hat and wig, in the street; this was held not to be a robbery; and in Plunket Horner's case, O. B. 1790, 2 East, P. C. 703, where the prisoner had snatched the prosecutrix's umbrella out of her hand, as she walked along the street, Buller, J., and Thomson, B., said, that it had been held, by very high authority at the Old Bailey, about eighty years before, that snatching any thing, unawares, from a person, constituted a robbery; but the law was now settled, that unless there were some struggle to keep it, and it were forced from the hand of the owner, it was not so; and they said, that this species of larceny seemed to form a middle case, between stealing privately from the person, and taking by force and violence. But where there has been a struggle by the owner to keep the property, and the thief gets it, this will be a robbery. This was held in the case of Davies, alias Beard,

2 East, P. C. 709, where the prisoner snatched at the prosecutor's sword, and, after a struggle, succeeded in stealing it. This was hold to be a robbery. And if there be any injury done to the party robbed, this will be sufficient force to constitute the offence of robbery. In James Lapier's case, 2 Ea. P. C. 708, the prisoner had torn the ear-ring of Mn. Hobart from her ear, as she came out of the Opera-House, and, in so doing, her ear was torn: this was held to be robbery. And in Morres' case, 1 Leach, 335, where the prisoner had taken a diamond pin, which was strongly fastened in her hair, and, in so doing, tore away a part of her hair; it was held to be robbery. It has been long settled, that the putting in fear, or force, must take place, before, or at the time of taking, and not after the taking. The prisoner, on an indictment for robbery may be acquitted of the capital part of the charge, and found guilty of simple larceny. Rex v. Francis, 2 East, P. C. 784.

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*REX v. THOMAS DAVIS.

If a person shoots at another who is endeavoring to apprehend him, he may he convicted on the usual indictment for shooting with intent to murder; though shooting with intent to prevent apprehending, is also a distinct capital offence, under Lord *Ellenborough's* act.

This prisoner was indicted for shooting at Sumuel Bott, with intent to murder, disable, or do him some grievous bodily harm.

The prosecutor, a gamekeeper, hearing a gun fired in the night, in a wood of his employer, went out to apprehend the party who fired it; he found the prisoner in the wood, who ran away, and on the prosecutor pursuing him, the prisoner fired at, and wounded him.

Ludlow, for the prisoner, objected, that by the 43 Geo. 3, c. 58, (Lord Ellenborough's Act,) it was a capital offence to shoot at a person with intent to murder him; and it was a distinct offence to shoot at a person to prevent his apprehending the person shooting: here the one offence was charged, and the other proved.

GARROW, B. Though it is an offence to shoot at a person having authority to apprehend another, to prevent his so doing, the only question to be tried here, is, whether the prisoner shot at the prosecutor with intent to murder, or disable, or do him some grievous bodily harm; if he did, he must be convicted on this indictment; however, he may, or may not, be also guilty under another clause of the act.

Verdict-Guilty

Male, for the prosecution. Ludlow, for the prisoner.

*SHROPSHIRE ASSIZES.

BEFORE MR. BARON GARROW.

WATSON et al. v. MURREL.

If the attornies on both sides, on an indictment against a parish for not repairing a road, enter into an agreement, in which one "agrees, on the part of the parish, to pay the costs," this agreement is personally binding on the attorney; and if it is agreed that A. B. shall tax the costs, it is no answer to an action for the costs, that the defendant had no notice to attend the taxation; if he did not object to that, when he was first apprized of the taxation having taken place in his absence.

Assumpsit. The plaintiffs and the defendant were all attornies; an indictment had been preferred against the parish of Ellesmere, for not repairing a road. On the part of the parish, it was wished, that the prosecutor should consent to the recognizances entered into on the part of the parish being respited. The plaintiffs were attornies for the prosecutor, and the defendant attorney for the parish; a memorandum was signed by the plaintiffs and the defendant; it stated—"Messrs. Watson & Harper, attornies for the prosecutor, agree that the recognizances shall be respited; and Mr. Murrel, on the part of the parish of Ellesmere, agrees to pay the costs; it being agreed, that Mr. Cooper shall tax the costs." Mr. Cooper proved that he had done so.

Peake, Serjt., objected, that no action could be brought against the defendant; he merely agreed, on the part of the parish, and the parish only were liable; and that no notice to attend the taxation had been served on his client, and

therefore, such a taxation could not be binding on him.

Garrow, B. I have no doubt, that in point of law, this is a personal engagement; but you may move to enter a nonsuit, on the second point.

Verdict for the plaintiffs.

*Taunton, and Campbell, for the plaintiff. Peake, Serjt., and Russel, for the defendant.

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[Attornies-Watson & Harper, and Murrel.]

† In the case of Appleton v. Binks, 5 East, 148, the plaintiff declared on a covenant between himself and the defendant, who was described in the covenant, as "T. Binks, of, &c. for, and on the part and behalf of the Right Honorable Lord Viscount Rokeby," it was sealed with the seal of the defendant, and it stated, if the plaintiff would convey a certain estate to Lord Rokeby, the defendant, "for himself, his heirs, executors, &c." on the part and behalf of the said Lord Viscount Rokeby, did covenant, that the said Lord Viscount Rokeby, his heirs. &c. would pay to the plaintiff 6000l. The declaration went on to state notice to Lord Rokeby, and his refusal to pay the money. To this declaration there was a general demurrer, and the Court held, that the covenant being by the defendant, in his own name, "for himself, his heirs. &c." and sealed with his own seal, he was personally bound by it. In the case of Wilkes v. Back, 2 East, 142, the Court said, that the proper way, where one executes a deed as attorney for another, is for him to sign, A. B. for C. D., or, for C. D., A. B.

COURT OF KING'S BENCH.

REFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Russel now moved to enter a nonsuit, on the ground, that no notice of taxa tion had been given.

BAYLEY, J. Did the defendant ever ask to have the taxation reviewed, or did he make any complaint when the money was demanded?

Russel. That does not appear, my lord.

ABBOTT, C. J. Taxation is a condition precedent, but the absence of one of the parties at the taxation for want of notice must be objected to at once, and not be delayed till an action is brought.

The other judges concurred.

Rule refused.

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BEFORE MR. BARRON GARROW.

WALMISLEY v. ABBOT.

To prove that a person has passed his examinations at Apothecaries' Hall, under the stat. 55 Geo. 3, c. 194, it is sufficient to produce the certificate of examination and fitness, (which is given to every one who is approved by the examiners,) and prove the signature of one of the examiners to it. By the stat. 55 Geo. 3, c. 194, no apothecary can recover his charges in a court of law, unless he prove at the trial, that he was in practice prior to, or on the 15th of August, 1815, or has obtained a certificate to practise, from the Apothecaries' Company:

This was an action, brought by the plaintiff, a surgeon and apothecary, for the amount of his bill.

To show that the plaintiff had passed his examinations, at Apothecaries' Hall, under the statute, 55 Geo. 3, c. 194, a witness produced the certificate of the plaintiff's examination at that place; and proved, that the signature of Mr. Simmons was of his handwriting, and that he acts as an examiner at Apothecaries' Hall; and that the certificate produced, was the usual certificate given to persons who had passed their examinations.

The defendant's counsel objected, that the signatures of all the examiners ought to be proved, or some one called, who was present at the examination.

GARROW, B. If it is proved that this is the usual form of certificate, and there is proof of the handwriting of any one of the examiners, and proof that that person acts as an examiner, I shall admit the certificate as evidence that the plaintiff has duly passed his examinations.

The items were proved in the usual way.

Verdict for the plaintiff.

In Easter Term, a new trial was moved for, in this case. The Court said, that as the decision would affect other cases, they would grant a rule nisi.

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By the statute 55 Geo. 3, c. 194, s. 22, it is enacted, that "No apothecary shall be allowed to recover any charges claimed by him in any Court of law, unless such apothecary shall prove, on the trial, that he was in practice as an apothecary prior to or on the 15th of August, 1815, or that he has obtained a certificate to practise as an apothecary, from the Master, Wardens, and Society of Apothecaries." It should be observed, that the section of that act which inflicts a negative on processing suitable suitable inflicts a negative on processing suitable suitable. of that act which inflicts a penalty on persons practising without a certificate, makes it necessary for persons to prove, to exempt themselves from the penalty, that they were in practice on the 15th of August, 1815; and a practising before that day is not sufficient to exempt the party from the penalty: Apothecaries' Company v. Roby, 1 Dow. & Ry. 564, though it is sufficient in an action for the recovery of an apothecary's bill. And the case of the Apothecaries' Company v. Warburton, 3 B. & A. 40, decides, that the mere administration of the recovery of the conduction of the control of the conduction of the conducti tering of medicine is not enough, by itself, to justify the conclusion, that the party practised as an apothecary; and if evidence is given, that the defendant could not read pre-scriptions, and did not know the weights and measures used by apothecaries, it is cogent evidence, from which a jury may presume, that he did not practise as an apothecary. See the case of Brown v. Robinson, supra, page 264.

*BEFORE MR JUSTICE PARK.

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REX v. RICHARD BECALL.

Embezzlement-Pleading.

let Objection.—If a person receives money as steward of another, proof of that is sufficient evidence of his being steward to support an indictment for embezzling that money.

2d Objection.—A steward who receives money for his employer, which his employer would be guilty of an illegal act in receiving, and such money is kept by the steward and never reaches the master's hands: Whether this is embezzlement of the money of the master—

3d Objection.—If the steward, when told by his employer, that he has his money in his

hands, admits he had used the money, but offers to pay it over, and the master will not receive it—will an indictment for embezzlement lie?

4th Objection.—Whether a servant of one body, receiving money for another body, and appropriating it to his own use, is guilty of en realiment—Quære.

5th Objection.—Whether, if an act of parliament vests the property of "goods, chattels, furniture, clothing, and debts," in certain persons, the property of the money, and securities for money be in them—Quære.

6th Objection.—If an act of parliament enacts that certain persons shall be called "directors of the noor, &c.," anare, whether, in an indictment, property may be laid in them by

of the poor, &c.," quare, whether, in an indictment, property may be laid in them by the name of the "directors of the poor, &c.," they not being a corporation aggregate. 7th Objection.—Whether, in indictments for embezzlement, it is necessary to state from whom the money embezzled was received—Quære.

This prisoner was indicted for embezzlement, under the stat. 39 Geo. 3, c. 85. There were seven indictments against him, for different embezzlements.

By a private act of parliament, the poor of the parishes in Shrewsbury and its suburbs, were united, and all persons, being owners of houses, &c., of the value of 15l. a-year, were appointed guardians of the poor, and were constituted a corporation, under the name of "The Guardians of the poor of parishes in and near the town of *Shrewsbury, in the county of Salop;" and were to have perpetual succession, and a common seal; by another section of this act, twelve directors were to be appointed, who were to manage the concerns of the poor, and of the house of industry. They were to be called, "The directors of the poor of parishes in and near the town of Shrews. bury, in the county of Salop:" (but they were not constituted a corporation.) In these directors, the property of all goods, chattels, furniture in the house of industry, clothing, and debts due to the corporation, were vested: they were also empowered to appoint a proper person to be steward to the corpora-

tion, and another fit person to be clerk to the corporation.

The indictment on which the prisoner was tried stated, that he being employed in the capacity of a Steward to the Directors of the Poor of Parishes in and near the town of Shrewsbury, in the county of Salop, and as such steward entrusted by the said directors to receive money, &c.; and being so employed, did, by virtue of such employment, receive fifteen promissory notes, for the payment of fifteen pounds, (the several sums of money secured, &c., being due and unsatisfied,) for and on account of the directors, his employers, and that he did on, &c., feloniously embezzle and steal the said promissory notes from the said directors, his masters, and employers, to whose use he received the same, being at the time of committing the said felony the property of the said directors, against the form of the statute, &c.

The second count was similar, except that it stated him to be clerk to the

directors.

The third count stated him to be a servant of the directors.

The fourth count was for a larceny at common law.

A witness proved, that the prisoner acted as steward at the steward's office, in the house of industry, and had also acted as such at several meetings of the directors.

*Curwood objected, that his appointment as steward, would, if produced, be the best evidence of what capacity he filled.

PARK, J. If it is proved that he received the money embezzled as steward,

that is sufficient.

A witness proved, that he being the reputed father of a bastard child, had agreed with the directors to pay them 301. by two instalments, for them to be at the expense of maintaining the child: he proved paying 151. to the prisoner, as the steward, a part of which was 11. notes of the Shrewsbury bank.

Curwood objected, that these payments in the lump for bastard children being illegal, the present payment was not of any money that the directors could be entitled to; and therefore the prisoner could only have deprived them of what they would have been guilty of an illegal act in receiving; and as it never, in fact, came to their hands, the money was never their property.

PARE, J. I shall not decide on this objection at present. Let the case pro-

ceed, and I shall hear all the objections.

Another witness proved, that when the prisoner was sent for by the directors, they told him there were several sums of money received by him and not accounted for; among the rest the sum mentioned in the indictment. The prisoner acknowledged that he had appropriated the money to his own use, being much pressed for money at the time; he therefore owed them that sum, which he would repay them. They would not, however, consent to receive it.

Curwood objected, that this was not in law an *embezzlement, admitting that the steward says to his principal, I have got so much of your money in my hands, and I will pay it over to you; that is no embezzle-

This being the case for the prosecution—

Curwood objected, that, by the act of parliament, the steward was steward to the corporation of guardians, and not steward to the directors; and, thereforc, if a man, being servant to one body, receives the money of another body, and does not account for it, not being the servant of the body whose money he appropriates to his own use, he is not guilty of the crime of embezzlement: and, besides, he was stated in every count but the last, (which was for a larceny,) to be, in some capacity or other, a servant of the directors, which was not proved, and was even contrary to the fact.

His next objection was, that, by the act, the property of all goods, chattels, furniture, clothing, and debts due to the corporation, was vested in the directors; but money, and securities for money, not being so vested by the act, the property in them remained either in the guardians or in the parish officers of the parish, to which the money would have been due. No count of the present indictment laid the property either in the guardians, or in the parish officers. Therefore the property was laid in the wrong persons.

His next objection was, that the notes were laid to be the property of "the directors of the poor, &c." No body of persons, except they are a corporation aggregate, can have property by a joint name. The directors were not a corporate body; therefore, the property ought to have been laid, if it belonged

to them at all, as the property of A. B., C. D., &c.

His next objection was, it was charged, that the prisoner, being steward, received fifteen one pound notes, *and embezzled them. The indictment did not state from whom he received the notes. This, he contended, was a fatal omission: he believed, that in all the indictments for embezzlement, tried in London and Middlesex, the name of the person from whom the money embezzled was received was always stated; and if there was ever a case in which it was peculiarly necessary to state that, it was the present. Here the steward received sums of money daily, and he is charged with receiving fifteen one pound notes, and embezzling them: how could he know how to make his defence, what witnesses could he call to show that he had not received them, or that he had paid them over? Besides, the prosecutors were not limited to the day mentioned in the indictment; they might bring evidence to support a charge of embezzlement on any other day; the only thing that could give the prisoner an idea what charge he had to meet, was by the indictment stating from whom the money embezzled was received. And, further, if this objection were not valid, how could the prisoner plead autrefois acquit to an indictment similarly framed for the same offence? There would be nothing to show whether it was the same sum of money, or a different set of one pound notes received from another person. With regard to the fourth count, no felonious taking had been proved.

It was admitted by the counsel for the prosecution, that all the other indict-

ments were open to the same objections.

PARK, J. The objections are, some of them, so important, that I shall reserve them for the opinion of the twelve Judges.

Verdict—Guilty.

Bather, and Russel, for the prosecution. Curwood, for the prisoner.

[Attornies—Cooper and Harper.]

See Rex v. George Wellings, infra, p. 315.

*REX v. GEORGE WELLINGS.

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If a clerk receive money for his master, (it being no part of his employment to receive money.) and appropriate it to his own use: Whether this is in law an embezzlement — Quære.

This prisoner was indicted for embezzlement.

There were five indictments against him.

He was clerk to the Guardians of the Poor, appointed under the private act of Parliament, mentioned in the last case, (Rex v. Richard Beacall:) the indictments were all framed as in that case. In each, the first count stated him to

be clerk to the Directors of the Poor. The second count stated him to be a

servant to the directors: and the third count was for a larceny.

The evidence against him was, that a person paid an annual sum for the maintenance of one of his relations in the house of industry. This sum was received by the prisoner, and when charged with having appropriated it to his own use, he acknowledged having done so: but he offered to repay the money, but the directors would not accept it.

The prisoner's counsel called for the production of the book in which the

proceedings of the directors at their meetings were entered.

From this it appeared that the prisoner had been appointed clerk to the cor-

poration.

The prisoner's counsel contended, that the directors claiming a balance, and the prisoner's offer of repayment when the deficit was mentioned to him, were circumstances to show a mere civil debt, and not a felony; and that the clerk of the corporation, (which the prisoner was proved to be,) appropriating to his own use the money of the directors, was not in law guilty of an embezzlement.

They next contended that it was not the duty of the clerk to receive money,

*316] that being the duty of the *steward; therefore, if he misapplied money
paid to him, he did not receive it as clerk, or by virtue of his employment.

The prisoner's counsel then repeated the 5th, 6th, and 7th objections made in the case of Rex v. Richard Beacall, (ante, page 310.)

PARE, J., reserved all the objections for the opinion of the twelve Judges.

Verdict-Guilty.

Bather, and Russel, for the prosecution. Curwood, and Carrington, for the prisoner.

[Attornies—Cooper, and Nock.]

The opinion of the twelve Judges in this case, and in the case of Rez v. Richard Beaseall, ante, p. 310, have not yet been made public.

HEREFORD ASSIZES.

BEFORE MR. JUSTICE PARK

APPERLEY, Clerk, v. GILL.

la an action by a Vicar, for not setting out predial tithes, proof of a single payment to him, or any of his predecessors, of that species of tithe, is evidence to go to the jury that the vicars of that place are endowed with that species of tithe.

This was an action of debt, brought by the plaintiff, who was vicar of Oakle-pitcher, against the defendant, for the treble value of the tithe of corn grown on the defendant's lands within that parish.

A witness, who was servant of the vicar, proved that the plaintiff acted as

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vicar of the parish; and that the *defendant had reaped a quantity of corn in the parish; and that the witness knew of no tithe being set out by the defendant.

Campbell objected, that there was no proof that the vicars of Oaklepitcher

were endowed with the tithe of corn.

A witness was then called, who stated that he had paid 281. to the plaintiss, in lieu of the great and small tithes of one of the farms the defendant had

since occupied.

Campbell objected, that though this proved that the vicars were endowed of the whole of the tithes of one farm, it did not prove them endowed with the corn tithe of all the farms; as nothing was more common than for a vicar to be endowed with the whole of the tithes of one farm, (the manor farm, for instance,) while he has only some of the tithes on the other farms.

PARK, J. The receipt by a vicar of a particular species of tithe from any farm, is evidence to go to the jury, that he is endowed with that species of

tithe

The defence was, that the plaintiff had simoniacally bought the living.

To prove this, the Rev. Archdeacon Lilly, the patron of it, was called; but he wholly denied it.

Verdict for the plaintiff.

* Taunton, and Russel, for the plaintiffs. Campbell, for the defendant.

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[Attornies ——.]

A practice has prevailed of late, where the attorney for the plaintiff thinks his case very clear, and that there is a good chance of getting judgment by default, of bringing actions of debt, for goods sold, money lent, work and labor, and other simple contract debts: and by bringing the action in debt, instead of assumpsit, if judgment goes by default, the plaintiff may have final judgment without a writ of inquiry. This is certainly, so far, an advantage; but, at the same time, there is some risk of the defendant's waging his law, &c., and if the defendant puts a wager of law upon the record (of which there are forms in 3 Chitty on Pleading, Lilly's Entries, Coke's Entries, and Ashton's Entries;) a day is given to the defendant by the Court, to "come and make his law," and if he comes to the bar of the court, and makes oath, that he does not owe the money, or any penny thereof, and he brings eleven persons (of his own choosing) with him, who swear that they believe what he says, the Court will order judgment to be entered for him; and the plaintiff is not permitted to go into any proof in support of his case. The whole form of waging law is given in 2 Salk. 682; where it appears, that the plaintiff 's counsel asked the Court not to receive the defendant's wager of law; but Holt, C. J., said, "we can admonish him: but if he will stand by his law, we cannot hinder it; seeing it is a method the law allows." The defendant came, as did his compurgators; and he took his place at the right corner of the bar, without the bar; and the Secondary asked him if he was ready to wage his law? and on his answering in the affirmative, the Court admonished him and his compurgators, which, says the Report, they regarded not so much as to desist from it. And the defendant laid his hand on the book, and swore that he did not owe the money, mode et formac, or any penny thereof; and the compurgators laid their hands on the book, and swore that they believed what the defendant swore was true; and the defendant had judgment in his fa

*GLOUCESTER ASSIZES.

BEFORE MR. BARON GARROW.

REX v. JOHN SCULLY.

A person set to watch a yard or garden, is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's hen-roost. But if from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him.

This prisoner was indicted for manslaughter, in shooting a man whose name was unknown.

It was proved that the prisoner had been set to watch his master's premises, and that he came to a constable to surrender himself. He said he had unfortunately shot a man; and that he having seen the man on his master's garden wall in the night, hailed him; and the man said to another, whom the prisoner could not see, "Tom, why don't you fire?" That he (the prisoner) hailed them again, and the same person said, "Shoot and be d—d," whereupon he fired at the legs of the man on the wall, whom he missed, and shot the deceased, whom he had not seen from his being behind the wall.

This confession was the only evidence against the prisoner; but it was proved, that when the deceased was found, he had three dead fowls and a housebreakers' crowbar lying near him, and a flint, steel, and matches in his pocket.

Garrow, B. Any person set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.

Verdict-Not Guilty.

Justice, for the prosecution. Carrington, for the prisoner.

[Attornies—Hinton, and Russell.

REX v. WILLIAM WALKER.

If a person is driving a cart at an unusually rapid pace, and drives over another, and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so if he had not been drunk.

This prisoner was indicted for manslaughter, in killing Thomas Crates.

The deceased was walking along the road leading from Bristol to Bitton, in

a state of intoxication. The prisoner was driving a cart drawn by two horses without reins; the horses were cantering, and the prisoner sitting in front of the cart. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so; and one of the cart wheels passed over him, and he was killed.

GARROW, B., laid down, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if from the rapidity of the driving, or any other cause, the person cannot get out of the way time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man who drives any carriage, to *drive it with such care and caution as to prevent, as [*321 far as in his power, any accident or injury that may occur.

Verdict-Guilty.

Carrington, for the prosecution. Philpots, for the prisoner.

[Attornies-Hinton, and Chadborn.]

(Civil Side.)

BEFORE MR. JUSTICE PARK.

REX v. JAMES STAMP SUTTON COOKE, and JENKINSON.

Practice.—If two defendants are indicted for a conspiracy, the Judge will, under certain circumstances, permit one of the defendants, who conducts his own case, to cross-examine before the counsel for the other defendant, and after the conclusion of the presecutor's case, to address the jury and call his witnesses, before the counsel for the other defendant opens his case.

A witness who is subpossed by a defendant indicted for a conspiracy, is compellable to give evidence, though such defendant refuses to pay his expenses; and the indictment having been removed by certification, and coming down to the assizes as a civil record,

does not make any difference as to this.

These defendants were tried on an indictment which charged them with a conspiracy to disturb Sir George Jemingham, Bart., in the peaceable possession of his estates. The indictment had been removed by certiorari.

Campbell appeared as counsel for the defendant Jenkinson, and the defendant

Cooke conducted his case in person.

On the application of Campbell—

PARK, J., permitted the defendant Cooke to cross-examine before Campbell, and to address the jury and *call his witnesses, before Campbell entered at all on the defence of Jenkinson.†

† The usual course, where several defendants appear by separate counsel, is, for the senior counsel, employed on that side of the question, to cross-examine, and address the jury first, whichever defendant he may be employed by; and as soon as he has concluded his address to the jury, for the counsel for the other defendants to address the jury in succession; and, after them, such defendants as conduct their cases in person: and then for the counsel who first addressed the jury, to examine his witnesses; and then the witnesses for the others to be called; and, in conclusion, for the prosecutor's counsel to reply. This rule, however, I have known to be departed from; for, in an excise prosecution for a riot, tried at Gloucester, before Abbott, C. J., where there were eight separate defences his Lordship, on account of the special circumstances of the case, allowed each counsel

A witness who was called by the defendant Cooke, stated, before he was examined, that at the time he was served with the subpoena, no money was paid him; he therefore asked that the judge would order the defendant Cooks

to pay his expenses before he was examined.

PARK, J., (having consulted with Garrow, B.) said, my brother Garrow and myself are of opinion, that I have no authority in a criminal case, to order a defendant to *pay a witness his expenses, though he has been subponaed by such defendant; and we are also of opinion, that the case is not altered by the indictment having been removed by certiorari, and coming here as a civil record.t

The witness was examined without being paid.

Verdict—Cooke, Guilty; Jenkinson, Not Guilty.

Tounton, and Russell, for the prosecution. Campbell, for the defendant Jenkinson.

[Attornies—Hanrot & M., and Orchard.]

to examine his witnesses, immediately after his address to the jury, and before the defence of any other of the defendants was entered into. In cases of conspiracy, the practice is for the defendants, in the order in which they are named in the indictment, to address the jury, by themselves or their counsel, without any regard to the counsel of one defendant being sentent to the counsel of another or to one having sentent while another has near being senior to the counsel of another, or to one having counsel while another has none. In the case of Rex v. Henry Hunt & Others, who had been found guilty of a conspiracy, the defendant Hunt (none of them having counsel) wished to address the Court, in mitigation of punishment, after the other defendants had done so; but the Court held, that they must speak in the same order in which they were named in the indictment.

† Whether a witness is liable to an attachment for disobedience of a subpossa in a cri-

minal case, if he does not go to the trial, because his expenses were refused him when the subpœna was served, has never been decided; but the better opinion seems to be, that he is bound to obey the writ, though his expenses are refused.

REX v. YEATES.

Practice.—On the trial of quo warranto informations, if the affirmative of the issues is on the defendant, he begins; but if it is on the relator, he does.

This was an information in nature of a quo warranto, calling on the defendant to show by what authority he exercised the office of a burgess of the town of Monmouth.

The defendant pleaded several pleas, and the relator replied specially.

Denman, Common Serjeant, for the defendant, contended, that he ought to begin, as the defendant was called upon to show by what authority he exercised the office. *He ought to show his authority for so doing, and then the relator might impeach his title to the office if he could.

Taunton, contra.—The relator ought to begin, as he objects to the defend-

ant's right to hold the office.

PARE, J. I believe the point is new. As the affirmative of the issue is on the defendant, he must begin; but if, on the pleadings, the affirmative had been on the relator, he must have begun.

Denman, Common Serjeant, for the defendant.

Taunton, for the plaintiff.

[Attornies—Tyler, and Philpots.]

In cases of this sort, it is often a great object to determine which side shall begin; because, if it is quite certain that both parties must call witnesses, the party that begins the reply

WHITE et al., Assignees of SYMS, v. GAINER.

A person having a lien upon goods, does not waive that lien by the mere fact of his omitting to say that he claims the goods in that right, when they are demanded. Nor is it sufficient evidence of a waiver of his lien that he bought these goods with others, and also refuses to deliver up the other goods, though he has no lien on them; the sale of both sets of goods being void.

TROVER for cloth. Plea-Not guilty, except as to 135 yards; as to which

judgment went by default.

The defendant was a dyer, and, as such, had a lien on all the cloth but the 135 yards; but it appeared, that the bankrupt, after act of bankruptcy, and after a knowledge by the defendant of his insolvency, sold the whole of the cloth, as well that covered by the lien, as the residue; but when a demand was made of the whole of it, the defendant merely said he would not give it up; but did not, in *terms, say whether he meant to insist on the purchase or on the lien.

Taunton, for the plaintiffs, contended, that the case of Boardman v. Sill, 1 Camp. 410,† was nearly in point; and that the plaintiffs were entitled to recover; because, at the time of the demand, he claimed no lien, and therefore must be taken to have waived it: and besides, it was clear, that he meant to rely, not on the lien, but on the purchase, as he equally refused to deliver up those cloths on which he had no lien.

PARK, J., was of opinion, that unless the defendant had waived his lien, it still existed in his favor; and that nothing like a waiver of the lien appeared in this case. His lordship therefore directed the jury to find the value of the one hundred and thirty-five yards only, which they accordingly did; and then found a verdict for the defendant, as to the residue.

Tound a verdict for the defendant, as to

Taunton, for the plaintiffs.

for the defendant.

[Attornies—Bevan, and Harris.]

† In the case of Boardman v. Sill, it was ruled, that if a person has a lien upon goods for warehouse rent, and when they are demanded of him, he makes no mention of any claim of lien, but claims them as his own property, trover may be maintained against him, without a previous tender having been made to him of the amount of his lien.

COURT OF COMMON PLEAS.

BEFORE BEST, C J., AND PARK, AND BURROUGH, JS.

In Banc.

Taddy, Serjt., for the plaintiffs, moved for a rule nisi *for a new trial; because the jury had not found a verdict for the plaintiff, for the value of the whole of the cloths. He urged the same points as were taken at the trial.

BEST, C. J. If the defendant had said that he claimed the goods as purchaser, or in any other right than arose from his lien, I am of opinion that that would have been a waiver of his lien; but here his omitting to say in what right he claimed them, is clearly not a waiver of his lien. The defendant keeps the goods, not saying in what right; and the plaintiffs seek to recover them in

To do that, he having a lien, they must tender him the an action of trover. amount of his lien, before they have a complete right to the goods.

PARK and BURROUGH, Js., expressed themselves of the same opinion.

Rule refused.

FREEMAN v. ARKELL.

If a magistrate, in an action for a malicious prosecution, is called on to produce an information taken before him, and he state that he delivered it at the Quarter Sessions to the Clerk of the Peace, or his clerk: if the Clerk of the Peace proves that he cannot find it in his office, that is sufficient proof of loss, to let in secondary evidence, without calling the clerk of the Clerk of the Peace.

This was a new trial of the case reported at page 135, supra.

Dr. Timbrell, the magistrate, proved the delivery of the papers, at the Quarter Sessions, to the Deputy Clerk of the Peace, or his clerk.

Mr. Bloxsome, deputy clerk of the peace, proved, that on searching his

office, no such papers could be found.

The Court of King's Bench have decided, that as Dr. Timbrell, the magistrate, cannot find the papers, and the Deputy Clerk of the Peace also cannot; *that is sufficient presumptive evidence of their loss, to entitle the plaintiff to give secondary evidence of their contents, without calling Mr. Bloxsome's clerk.

Evidence was given to show a want of probable cause and malice.

Verdict for the plaintiff—Damages, 5%.

Campbell, and Godson, for the plaintiff. Tounton, and Russel, for the defendant.

[Attornies—Godson, and Fryar.]

See this case, ante, page 135.

JONES et al. v. CARRINGTON, Clerk.

lesue to try moduses.—Evidence.

On issues to try moduses, owners of lands in the parish, are not competent witnesses, and the depositions of such witnesses as are dead cannot be read, if it is shown that they were interested, though no such thing appears in the deposition, and though their evidence was read in equity.

Whether the receipts of a vicar's lessee are admissible evidence of a modus—Quare: and also, what is sufficient proof that he is lessee.

This was an issue, directed by the Vice-Chancellor, to try "whether, from time whereof the memory of man runneth not to the contrary, there had been payable and paid, and of right ought to be paid, to the Vicar of the parish of Berkeley, one penny for every milch cow kept in the parish, at any time within the year, the sum of one penny, at Lammas, old style." And a similar issue on a modus of one penny for every colt.

The defendant at law was vicar of the parish, and the plaintiffs at law were farmers there. A bill had been filed by the vicar for an account of all small tithes: at the hearing, moduses on many other articles were insisted on; but all of them were then disposed of, except these two, as to which the present issues were ordered.

*In support of the moduses-

A witness produced from the bishop's registry, a terrier, dated *Decem-* [*328 ber 11, 1800, signed by the defendant and upwards of thirty occupiers. This terrier, which, on the face of it, purported to be copied from a terrier, dated 1682, stated these moduses and a great many other species of tithe.

Another witness produced examined copies of the bill, answer, and depositions, in the cause in Chancery, for the purpose of reading the depositions of

such witnesses as had died since the hearing of the cause.

It was wished to read the deposition of Dr. Jenner, who was dead, and who was admitted by the plaintiff's counsel to be an owner of lands in the parish, at the time; but this did not appear on the face of his deposition, and his deposition had been read at the hearing in Chancery.

The defendant's counsel objected.

PARK, J., held, that all owners of lands in the parish were incompetent witnesses,† and would not allow the *deposition of any owner of lands in the parish, who had died since the hearing, to be read, though it did not appear, by his deposition, that he was an owner of lands.

The plaintiff's counsel wished to read a part of the deposition, in which he

proved the signature of the Rev. S. Jenner (a former Vicar) to a paper.

'The defendant's counsel objected, that as Dr. Jenner was examined to merits, it invalidated his whole deposition; and further, that even in the answer to the interrogatory under which he proved the handwriting, he said something in favor of the paper he proved.

PARK, J. Those parts of the deposition, which go to prove the handwriting only, may be read, and no others.

The paper so proved, was read.

It was an agreement for a lease, for seven years, of the vicarial tithes of Berkeley, to Samuel Pearce; it was not under seal, nor on any stamp.

The plaintiff's counsel wished to give in evidence, receipts for the payments, laid as moduses, given by Samuel Pearce to different occupiers of lands in

the parish.

The defendant's counsel objected to the admissibility of these receipts, on the ground, that tithes lying in grant, and not in livery, no interest passed by this agreement, which was not under seal; and further, that if it did constitute Pearce a lessee of the tithes, his receipt was no evidence against the rights of the church, as the acts of a lessee for years, of a tenant for life, could never be binding on the rights of the inheritance, and cited the case of Wood v. Veel, 1 Dow. & Ry. 20.

*Park, J., held them admissible.

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They were read. A witness proved, that for about forty years before the incumbency of the

[†] In the case of Lord Clanricard v. Lady Denton, 1 Gwill. 360, it was held, that where a parish, or vill, claims to be exempt from tithes, any one who would be liable to tithes, if the parson's claim were allowed, is not a competent witness for the exemption. decision only shut out the evidence of the tithe payers, but left the land-owners untouched. But the case of Rhodes v. Ainsworth, 1 B. & A. 87, decides, that, on the trial of an issue. whether the owners of property within a certain chapelry are liable to repair that chapel, an owner of lands there is not a competent witness, to disprove the liability, though his property is in the occupation of a tenant, who agrees to pay rent, without any deduction; for the land-owner is interested in removing a permanent charge, and so improving the value of his estate. And in the case of Mosely v. Davis, (MS.,) tried at Monmouth. Garrow, B., held, that on an issue to try a parochial modus, all owners of lands are incompetent.

de ndant, her father and brother, named Croome, had successively been tenants of the tithes (after Pearce) under the six immediate predecessors of the defendant.

The plaintiff's counsel wished to put in the receipts of the Croomes.

The defendant's counsel contended, that this certainly was not enough to connect them with the vicars.

PARK, J., however, held the receipts admissible.

Another witness was called, who admitted that he was an owner of lands in the parish, and stated that he had found the receipts he produced among the papers of his wife's father, who was a relation of the person who was named in the receipts, as having paid the money.

The defendant's counsel objected, that as he was an incompetent witness, he ought not to be allowed to give evidence to accredit the papers he put in; for that, though an interested witness might hand in papers, he was not to be allowed to give any oral account whatever.

He may say where he got the papers he puts in, though he is interested.

Some old witnesses proved a reputation in the parish, that there were such moduses.

*For the defendant.—An examined extract from Pope Nicholas's Taxation.—An examined extract from the Valor Ecclesiasticus, temp. Henry 8th.—And an examined extract from the Parliamentary Survey of 1649t

† In cases of parochial modus, the general reputation in the place, that there is or is not a modus, is evidence; but it is generally of little value, as in most cases the witnesses on each side prove the reputation to be their way. Witnesses very often differ as to facts,

and oftener still as to reputation.

This survey was founded on inquisitions taken before commissioners, in which a jury found the ecclesiastical state of each parish at that time; and the great accuracy of this survey is spoken of by Lord *Ellenborough*, in 11 Ea. 284, and 1 M. & S. 294. Of these inquisitions, (under the seals of the jurors,) a few remain in the Rolls chapel, and one of inquisitions, (under the seals of the jurors,) a few remain in the Rolls chapel, and one of them, relative to the living Lakenheath, was produced, from the registry of the bishop of Norwick, in the recent case of Butt v. Wiseman: but a perfect copy of the whole of them is contained in several large MS. volumes, which are deposited in the library of Lambeth palace. These volumes are but copies of the original inquisitions; but as the originals were mostly burnt, these copies are evidence. But it should be observed, that an examined extract of the Parliamentary Survey in Lambeth palace is evidence, though it may be said it is but the copy of a copy. I have seen these examined extracts constantly given in evidence, both in courts of law and in Equity. The only cases in print that I am aware of, that regard the admissibility of the surveys taken by the authority of the Parliament during the usurpation, are Underhill v. Durham, Freem. 509, and 2 Gwill. 542, and the cases there cited, which decide that, though taken during a usurpation, they are evidence. during the usurpation, are Underhill v. Durham, Freem. 509, and 2 Gwill. 542, and the cases there cited, which decide that, though taken during a usurpation, they are evidence. With regard to the admissibility of a copy of the Survey in Lambeth palace, I have been favored with an exact copy of a note of a decision on the subject. This note is in the handwriting of Dr. Ducarel, who was formerly keeper of the records there, and is written in the volume which contains the index to the Parliamentary Survey. The learned Doctor's note, which I have seen, is in the following terms:—"19th July, 1775. In the Exchequer; Sittings after Trinity Term, at Serjeant's Inn, present. Lord Chief Baron Smythe, and Barons Eyre and Burland: Travis v. Oxton & Others. Concerning the tithe hay of Netherpool, within the parish of Eastham in Cheshire. A copy of the Parliamentary Survey of church lands. (so far as relates to this parish.) long since deposited in the MS. Survey of church lands, (so far as relates to this parish,) long since deposited in the MS. library at Lumbeth, and properly authenticated by the archbishop's librarian and keeper of his records there, being offered to the Court as evidence on the behalf of the plaintiff, of his records there, being offered to the Court as evidence on the behalf of the plaintiff, it was objected on behalf of the defendant, 'that the survey deposited at Lambeth being itself only an office copy, it ought to have been produced there, and not an authenticated copy thereof, which it was said could not be admitted as evidence.' But upon the plaintiff's counsel producing to the Court (from the printed journals) the three orders of the House of Commons, dated August 6th, and August 7th, 1660, and May 13th, 1662, relative to these Parliamentary Surveys, the Court over-ruled the objection, and unanimously agreed, that these surveys, and all other papers delivered with them to the then archisched of Canterbury, were originals, and ordered authenticated copies of them to be henceforth admitted as evidence; and an entry of this order was that day made in the register book of the Court of Exchequer." The orders of the 6th and 7th of August merely direct, that all records relative to church lands and property be deposited in an office in Broad Street, and that of the 13th May states, that Mr. Crouch, a member of the House, stated that he had received from Mr. Nye, in pursuance of the orders of the House, divers presentations, books of institutions, and other records and writings, relative to ecclesiasting. were *put in. Neither of these mentioned any modus to be payable in this parish. An examined copy of the bill, answer, and depositions, in a suit in the Exchequer, in the reign of Charles the Second, between the then vicar, and an occupier of lands, for an account of small tithes, was also put in. This suit was the case of Dasfield v. Curnocke, reported in Hardres, 329; the then defendant did not set up any modus, and one of his witnesses stated, that the vicars of Berkeley always received "the privee tithes of the parish."

*An examined extract of the minister's accounts in the augmentation office was produced, to show that a place called *Hulle*, alias Hill, was a hamlet of *Berkeley*, in the reign of *Henry* 8th; and from the extract from

the Parliamentary Survey, it appeared that it was so in 1646.

The incumbent of the living of *Hulle*, otherwise *Hill*, proved that it was now called a parish, and that he received the vicarial tithes of it in kind, and that no *modus* was ever claimed there to his knowledge or belief.

On this evidence the jury found a verdict for the plaintiffs, on both issues.

Taunton, Ludlow, Campbell, and Twiss, for the plaintiffs.

Curwood, Russel, and Cross, for the defendant.

[Attornies-White, and Keene.]

*BEFORE SIR J. LEACH, KNIGHT, VICE-CHANCELLOR.

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Curwood now moved that his Honor would apply to Mr. Justice Park, for a copy of his notes of the trial of this issue, on the ground that the receipts of Pearce and the receipts of the Croomes were inadmissible; because the receipts of a lessee for years of tithes, were no evidence against the rights of the perpetuity; and further, that there was no sufficient evidence to show them to be lessees; and on the ground that interested witnesses ought not to have been

cal livings, and desired the direction of the House. The House ordered that the records, presentations, books of institutions, and other writings, should be delivered into the hands of the Most Rev. Father in God, the Archbishop of Canterbury, "who is desired to take care thereof, that the same may be preserved in perpetuity for public use." Another vote follows regarding records, which relate to the different bishoprics and chapters, which are also to be delivered to the archbishop, who is to send these last to the respective bishops and chapters who are therein concerned, if he thinks fit. "And it is further ordered, that these votes be printed and published; that all persons concerned may take notice thereof."

thereof."

† Old depositions in former tithe suits, in the same parish, are constantly admitted in evidence, and so are answers, if they relate to the tithes of the same lands; and these are equally evidence, whether there has been any decree or not. To give the deposition in evidence, you must put in examined copies of the bill and answer, before you can give in evidence the examined copy of the depositions. But it has been held, that depositions may be read without the bill and answer, if they are so ancient that no bill or answer can be forthcoming; as. formerly, bills and answers were not enrolled. See Bryon v. Boolts, 2 Price, 234. In Illingworth v. Leigh, 4 Gwill. 1619, the depositions made in an old suit were tendered in evidence before Heath, J., without producing the bill and answer, or proving that due diligence had been used to discover them, but without effect; Heath, J., held them clearly inadmissible. On a motion for a new trial, the Court of Exchequer held that the learned Judge was mistaken in rejecting the evidence; but Sir H. Gwillim adds, that he was informed that the Judges gave no reasons why they thought the depositions admissible under these circumstances. In the case of Hunt v. Douglas, (MS.) sittings after M. T. 1821, which was an issue to try a modus, Copley, Serjt., objected, that certain old depositions should not be read, as the bill and answers had not been produced. But it appearing that they had been searched for and could not be found, Abbott, C. J., said, "As search has been made for the bill and answer, and they cannot be found, I must admit the depositions without them." However, the bill and answer are always highly material if they can be got, as they show whether or not the point the witnesses speak to was in issue or not.

permitted to speak in favor of the documents they produced; and that if inadmissible evidence had not been received, the weight of evidence would have been clearly with him.

The Vice-Chancellor granted the motion.†

† The Court of Chancery, when it directs the issue, always orders, that if the parties cannot agree on the form of the issue, it shall be settled by one of the Masters; but in general, the declaration on the issue is drawn and signed by the junior conneal of the plaintiff at law, (who is usually the defendant in Equity,) who also draws the plea, which is always in the same form, as it always admits the supposed wager mentioned in the declaration, and only contests the fact to be tried by the issue; and this draft is sent to the opposite party, whose counsel examines and signs it. The case is then conducted through all its stages in the common law court, precisely as any other action would be; and if either party wishes to have a special jury, it is struck in the same way as it would be in an action. The case is tried in the usual way, except that the plaintiff never loses the verdict, because he does not prove the affirmative of the issue precisely as it is laid, as it is always a part of the order for the issue, that the jury may find special facts, and the Judge indorses such finding on the back of the record. If a new trial is wished, it cannot be applied for in the court of law, but must be obtained in Equity. It is usual to apply for a new trial before that branch of the Court of Chancery which directed the issue; but the case of Pemberton v. Pemberton, 11 Vos. 50, decides, that if an issue is directed by the Master of the Rolls, a motion for a new trial may be made before the Lord Chancellor. A new trial may be moved for on any of the grounds on which it could be moved in a case in a court of law, such as misirection of the grounds on which it could be moved in a case in a court of law, such as misirection of the grounds on which it could be moved in the Court of Equity, and move that the Lord Chancellor, or Vice-Chancellor, (as the case may be,) will apply to the Judge who tried the cause, for a copy of his notes of the trial. Some good ground must be stated for this motion, as, if granted, it is conside

COURT OF COMMON PLEAS.

BEFORE BEST, C. J., AND PARK AND BURROUGH, JS.

RAWLINGS v. HALL.

SEE ante, p. 11. The rule for a new trial in this case having been argued, the Court were of opinion, that the broker (Little) was bound to produce his books, kept under the statute 7 Geo. 2, c. 8, s. 9, though he might thereby criminate himself; but as he had no notice to produce his book kept under this statute, but only was commanded by his subpana duces tecum, to produce his "contract book," the Court made the rule absolute for the new trial, on payment of costs.

*MAY et al. v. MAY et al.

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SEE ante, p. 44. The rule nisi for a new trial in this case, was never drawn up, the case being compromised.

THE cases of Sanderson and others, assignees of Barge, v. Laferest, ante, 46; and Lee v. Joseph, ante, 46; were compromised, before the rules nisi for a nonsuit in the former case, and for a new trial in the latter, came on to be argued. These cases were therefore struck out of the paper.

EVANS v. YEATHERD.

SEE ante, p. 49. In this case the Court made the rule absolute for a new trial.

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COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., AND GRAHAM, GARROW, AND HULLOCK, BS

HULME, Clerk, v. PARDOE, Widow.

SEE ante, p. 93. In this case a rule nisi, for entering a nonsuit, had been obtained; but upon argument, the Court, being of opinion that the verdict ought to stand, discharged the rule.

COURT OF KING'S BENCH.

REFORE BAYLEY, HOLROYD, AND LITTLEDALE, JS.

BLOXSOME v. WILLIAMS.

SEE ante, p. 294. The Court, after hearing the rule for entering a nonsuit in this case argued, were of opinion that the verdict for the plaintiff ought to stand, and therefore discharged the rule.

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CASES

AT

NISI PRIUS.

AT THE

SITTINGS IN AND AFTER TRINITY TERM.

PROMOTIONS.

IN Trinity Term, STEPHEN GAZELEE, Esq., one of his Majesty's counsel, was called to the degree of Serjeant at Law, and afterwards appointed one of the Judges of the Court of Common Pleas, vice Sir John Richardson, Knight, who resigned; and Robert Spankie, Esq., and John Adams, Esq., were called to the degree of Serjeant at Law.

COURT OF KING'S BENCH.

SITTINGS AT GUILDHALL, IN TRINITY TERM, 1824.

BEFORE MR. JUSTICE LITTLEDALE,

(Who sat for the Lord Chief Justice.)

WEBB v. SMITH, Gent., one, &c.

An articled clerk to an attorney, who is bound by his articles to keep all his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secrecy, nor affecting the interests of the master's clients; though the disclosure may go to support a civil action against the master.

Assumpsit against an attorney by a copying clerk for wages.

*Mr. Frankum, an Attorney, was called on the part of the plaintiff, and asked whether the defendant had not made some statement to him respecting the salary he intended to give the plaintiff.

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The witness objected to answering, on the ground that the statements inquired after were made during the time he was serving as an articled clerk to the defendant; and that by his articles he was required to keep all his master's secrets, for the performance of which articles he had also given a bond.

LITTLEDALE, J., inquired if the defendant had entrusted these statements to him as a secret; and was answered, that he did not give any directions, that

they were not to be communicated.

His Lordship then ruled, that, as the statements did not relate to any matter of business affecting the interests of defendant's clients, nor were specially entrusted as a matter of secrecy, there was not any objection to their being given in evidence.

Verdict for the plaintiff.

Scarlett, and Talfourd, for the plaintiff.
Gurney, and the Common Serjeant, for the defendant.

[Attornies—Fisher, and Hamilton & Twining.]

*339] *SITTINGS AFTER TRINITY TERM, IN LONDON

BEFORE LORD CHIEF JUSTICE ABBOTT.

ATKINSON v. COLESWORTH.

If the master of a ship enter into an agreement of charter party, not under seal, in which the defendant agrees to pay him the freight, by good bills: whether the defendant is justified in paying them to the owner of the ship, after notice by the master not to do so—Quere.

Assumest by the captain of the brig Agaphea, against the defendant, for freight and primage. The first count of the declaration was on an agreement of charter party, (not under seal,) bearing date the 21st of June, 1823, between the plaintiff, who was therein described as "commander of the good ship or vessel, called the Agaphea," and the defendant; by which it was agreed, that the vessel should take on board a cargo, and proceed to Pernambuco; and, having delivered it, should there, or at Paraiba, take in a homeward cargo, and deliver it at London, or Liverpool, (as directed,) on being paid freight and primage, (at the rates specified.) The freight to be paid on unloading and right delivering of the cargo, by a good and approved bill, payable in London, at two months' date from the day of final discharge; and for the performance of the agreements of the charter party, the parties thereunto bound themselves, &c.; and the charterer agreed to advance the said master 1501., on the vessel's arrival in London or Liverpool; the said master allowing the usual interest for the same, and the amount to be deducted from the bill before mentioned. The plaintiff then averred performance of the different things to be done by him and the ship; and a breach, that the defendant refused to pay the freight, by a good and approved bill, &c., (in the terms of the charter party,) or by any other bill or bills, or in cash, or otherwise howsoever; but wholly neglected, &c.

There were also an indebitatus count for freight, and the common money counts. Plea—General issue.

*The charter party was proved and put in. The terms of it were as stated in the first counts of the declaration; and, from the other evidence, it appeared, that a person named *Hodgens* was the owner of the vessel; and that, on her arrival at *Liverpool*, a person named *Bains*, who was the agent of *Hodgens*, the owner, desired the defendant not to pay the plaintiff the amount of the freight, but to pay it to him instead. The defendant declined paying it to *Bains*, without an order from the captain, (the plaintiff;) and on the 5th of *January*, 1824, the plaintiff having given such order, the defendant paid to *Bains*, the owner's agent, 150l.; however, on the 15th of *January*, the plaintiff sent a letter to the defendant, to desire him to pay no more freight to any one but himself; but the defendant did, after this, pay the residue to *Bains*, the owner's agent.

ABBOTT, C. J. I am of opinion, that, in this case, the captain was only acting as agent for the owner; and, being so, the owner had a right to change his agent if he chose; and he has done so. The plaintiff must be called.

Nonsuit, with leave to move to enter a verdict for the plaintiff. Gurney, and Chitty, for the plaintiff.

Scarlett, for the defendant.

[Attornies—Woodward & H., and Blunt & R.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Gurney naved to set aside the nonsuit in this case, and enter a verdict for the plaintift, and the Court granted a rule to show cause.

The case of Splidt and Others, assignees of Holmes, v. Bowles, 10 Ea. 279, [*341 accides, that a cevenant in a charter party to pay freight to the owner for the hire of the ship, is not transferred to a vendee by a bill of sale of the ship made during the voyage. By Morison v. Parsons, 2 Taunt. 407, it appears, that if an owner enter into an agreement of charter party; but, before the ship sails, he sells her, the vendee is entitled to the freight, as incident to the ship; but in order for him to succeed at law, he must sue in the name of the contracting party, and not in his own name. In the case of Schark and another v. Anthony, 1 M. & S 573, the captain of a ship, as agent for his owners, had entered into a charter party, under seal, with the defendant, to deliver goods at a certain freight. The owner now brought an action of assumpsit for the amount of that freight; but the Court held, that the same interest being secured by deed, assumpsit would not lie; and that if a bond were given to a trustee, it could not be contended, that the cestain que trust could maintain assumpsit for the recovery of the money secured by the bond. The case of Smith, assignee of Kirkpatrick, v. Plummer, 1 B. & A. 575, decides, that the captain has no lien on the ship, or freight, for his wages, or for money expended by him during the voyage. But in White v. Baring, 4 Esp. 22, (a much earlier case than the one above cited.) a captain recovered at nisi prius, before Lord Kenyon, on a bill of lading, he having made the contract in question; and having made contracts on account of the ship, on the faith of the freight being paid to him; Lord Kenyon however permitting him only to recover to the amount of the contracts he had so entered into. This case was mentioned in the course of the argument in Smith v. Plummer; but was not alluded to by the Court in giving judgment.

BEFORE MR. JUSTICE I ITTLEDALE.

(Who sat for the Lord Chief Justice.)

JOSEPHS v. PEBRER.

A note sent by a broker to his principal of a purchase he had made, does not require a stamp, as a minute or memorandum of an agreement; although the subject of the pur-

sump, as a minute or memorandum of an agreement; although the subject of the purchase be above 201. value, and not within any exemption from stamp duty. Whether an agreement relative to the buying of shares in a proposed joint stock company; to authorise which, no act of parliament has passed, or charter been granted, can be enforced—Quære. Whether a broker, who contracts a purchase for his principal, afterwards making good the contract, can recover the money he pays to complete it, of his principal, on any of the common money counts—Quære.

Assumpsir for work and labor, and money paid; with the common counts. Plea—General issue.

*This action was brought to recover the price of ten shares in the Equitable Loan Bank, and the broker's commission for the purchase

On the 7th of April, 1824, the plaintiff was employed, as a broker, by the defendant, to buy for him ten shares, of 50l. each, in the Equitable Loan Bank, for the day of their coming out. At this time meetings had been held for the purpose of obtaining an Act of Parliament for the establishment of a joint stock company, with a capital of two millions, consisting of shares of 50% each, for leading money on pledges of personal property, at the rate of 101. per cent. interest; and a deposit of 11. per share was to be paid on the day on which the certificates for such deposit were ready to be delivered out. This paying of the deposit, and delivery out of the receipt for it, was technically called the coming out of the loan. A bill was subsequently brought into Parliament, for the establishing of this company, but it did not pass. However, on the 7th of April, (the loan not having then come out,) the plaintiff bought ten shares, of a person named Goldsmidt, for the defendant; and, on the 21st of April, paid Goldsmidt 51. 10s. per share, that being 1l. per share for deposit, and 4l. 10s. premium; in all 651.: and the plaintiff also charged 21. 10s. for commission; and a sale note was sent by the plaintiff to the defendant.

The plaintiff's counsel wished to give this note in evidence. It was in the

following terms-

"London, 7th April, 1824.

"Bot by your order, and for your account, ten shares Equitable Loan Bank, of S. Goldsmidt, for the coming out.

" 5/. 10s. premium per share.

-Commission, 2l. 10s.

"Your most obedt. servant,

"E. Josephs. "Amount payable, £-

"If any errors, please to signify the same immediately."

*Gurney, for the defendant, objected, that this note could not be admitted in evidence, because it was not stamped; and being the minute, or memorandum of a contract, it required a stamp: t ordinary broker's notes, indeed, were admitted in evidence without stamps, because they related to the sale of goods, wares, or merchandizes, which are within one of the exemptions of the Stamp Act.

LITTLEDALE, J. I am of opinion, that this paper does not require a stamp. The minutes or memorandums of agreements which are charged by the Stamp Act, are minutes or memorandums between party and party:—this is merely the broker's account to his principal of what he has done. If the broker were agent for both parties, and made a minute of this bargain, such minute must be stamped, but as he is only agent for one party, and makes the minute for his own principal, it requires no stamp.

The note was read.

It further appeared, that the plaintiff got the certificates for the shares, on the 21st of April, from Messrs. Fry & Chapman, who were bankers to the loan; but that, on the 23d of April, defendant said he would not receive them, saying that they were procured too late, as the loan was proved to have come out on the 15th of April, and the value of shares had sunk in the mean time. It was also proved, *that sales are continually made in omnium as soon as a loan is proposed, and before any of the receipts or certificates of it are delivered out.

Gurney, for the defendant, contended, that the plaintiff must show who this company are. This company is to raise a large capital, consisting of small transferable shares; and before they get an Act of Parliament to allow them to do so, they are a non-existent body; and their shares, or any agreements relating to them, are mere matter of honor: and any contract relative to their shares cannot therefore be enforced in a court of law. And further, that if the company did exist at all, it was an illegal company, under the statute 6 Geo. 1, c. 18, s. 18, and therefore contracts relative to shares in such a company would be void.

Chitty, on the same side. It appeared by the opening of the plaintiff's own counsel, that this was a plan to lend money at a larger interest than is allowed by law, and they speak of an intended Act of Parliament; therefore, till such an Act is passed, the company itself is only prospective. And another point in this case is, that the plaintiff bought these shares as an agent for the defendant; and he therefore cannot recover the price *of them from the defendant, on the common count for money paid, or indeed on any of the common counts; and the case of Child v. Morley, 8 T. R. 610, decides this point; and if an agent is bound to pay money to complete a bargain he has made for his principal, he can only recover it of his principal on a special count, stating a special contract. An auctioneer might just as well pay the purchase-money for an estate, and then sue the purchaser for money paid.

† By the Stamp Act, 55 Geo. 3, c. 184, sch. part 1, "Agreement, or minute, or memorandum of an agreement made in England, and under hand only, when the matter thereof shall be of the value of 20l. or upwards, whether the same shall be only evidence of a contract, or obligatory on the parties, from its being a written instrument, together with

tract. or obligatory on the parties, from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto," are charged with a stamp duty of 1l.

† The statute, 6 Geo. 1, c. 18, s. 18, enacts that undertakings to the prejudice of trade, and subscriptions to pretended corporations, and transfer of shares therein, shall be illegal and void. This statute appears to have been made to suppress certain fraudulent schemes for joint stock companies then prevailing in this country. It possesses considerable obscurity in its enactments. In the case of the King v. Webb and Others, 14 East, 406, Lord Ellenborough gives a very elaborate judgment on the meaning of this statute; and more information on this subject, may also be derived from the cases:—The King v. Dodd, 9 Ea. 516; Brown v. Holt, 4 Taunt. 587; Pratt v. Hutchinson, 15 East, 511; and Buck v. Buck, 1 Camp. 547.

§ In the case of Child v. Morley, 8 T. R. 610, the plaintiff, a broker, had agreed with a purchaser for the sale of stock, which was the property of the defendant, his employer, for a future day. The defendant refused to complete the bargain, and the plaintiff paid the differences to the purchaser. It was held, that he could not recover them agair of his principal, on account for money paid.

Marryatt, contra. The case of Child v. Morley turned in some degree on the stock-jobbing Act, but in this case the plaintiff has bought the article, and paid the whole price of it to the seller. It is further said, that the company is an illegal one, but the certificates state, that the party is to have the shares, subject to the provisions of any future Act of Parliament; and, before such

Act passes, to the regulation of the directors.

LITTLEDALE, J. The facts proved are, that, on the 7th of April, the plaintiff bought the shares of Goldsmidt, and paid for them on the 21st, but they were not rejected till the 23d, therefore, there was no recall of the authority given to the plaintiff, to buy them, before the plaintiff had actually paid the money for them. However, I shall reserve three points .- First, whether the sale note requires a stamp.—Second, whether the plaintiff can recover on the common counts.—Third, whether it was an illegal company.

The defendant's counsel then went to the Jury on the *question whether the loan had, or had not, come out earlier than the 21st of April, and

whether the plaintiff had used due diligence.

Verdict for the plaintiff, damages, 671. 10s., being 651. paid, and 21. 10s. commissions.

Marryatt, and Comyn, for the plaintiff. Gurney, and Chitty, for the defendant.

[Attornies—T. N. Williams, and Fenton.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Gurney moved to set aside the verdict, on the points reserved at the trial; and also because the verdict was against evidence. The Court granted a rule to show cause.

SITTINGS AT WESTMINSTER, AFTER HILARY TERM.

BEFORE LORD CHIEF JUSTICE ABBOTT.

DOE, on the Demise of MORECRAFT, v. MEUX.

If ejectment is brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent, it is no waiver of the forfeiture.

EJECTMENT to recover premises, the lease of which was forfeited by a breach of covenant in not repairing *after notice, which, by the terms of the lease, was to incur a forfeiture. The defence was, that the lessor of the plaintiff had received rent from the defendant since the bringing of the ejectment, which, it was contended, waived the forfeiture.

ABBOTT, C. J. I am clearly of opinion that the receipt of rent, after an ejectment is brought on a forfeiture, is no waiver of such forfeiture.

However, at the request of the defendant's counsel, the Jury found for the lessor of the plaintiff, subject to a special case.

Marryatt, and Chitty, for the lessor of the plaintiff. Scarlett, and Brougham, for the defendant.

[Attornies—Pearse, and Smith & A.]

DEAN v. WHITTAKER et al., Sheriffs of Middlesex.

If a party has goods on hire for a term, and the Sheriff seizes them under an execution against such party, the owner of the goods may maintain an action on the case against the Sheriff, if the Sheriff sells the entire property of such goods: but to support the action, he must show, that, as soon as the goods were seized, he apprised the Sheriff that the goods were lent for a term only, in order that the Sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods.

Action on the case. The first count of the declaration stated, that the plaintiff was the proprietor of certain goods, which were lent to one *Greathead* for a term not then expired, and that the defendants contriving, &c., to injure the plaintiff's reversionary interest in the goods, took them, and absolutely sold them. There was also a count in trover. Plea—General issue.

Before the case was gone into, Scarlett, for the defendant, objected, that it appeared by the record, that the *plaintiff had lent the goods to Great-head, and that the defendant, as Sheriff, might lawfully seize them under an execution against Greathead; and therefore the plaintiff can maintain neither

trespass nor trover.

ABBOTT, C. J. The Sheriff might no doubt seize all the interest that Greathead had in the goods, and therefore the plaintiff can maintain neither trespass nor trover; but I see no reason why an action in this form may not be sup-

ported.

From the evidence, it appeared, that the officers of the Sheriff of Middlesex took the goods in question under a fi. fa. against Greathead for 461. As soon as the officers took them, they were told that they were only hired goods, the property of the plaintiff; and on the 20th of February, 1824, the officers received notice from the plaintiff, that all the goods seized, except the wearing apparel of Greathead and his family, and a piano forte, were his property; and that some days after this the plaintiff paid 461 into the hands of the Sheriff to redeem the goods, and that no steps whatever had been taken for the sale of the goods under the execution.

The defendant's counsel objected, that the plaintiff had declared on an injurious sale by the Sheriff, whereas there was no sale, nor even were steps taken

relative to a sale.

ABBOTT, C. J. I think this won't do. It is not shown that the Sheriff had any present intention to sell. It seems to me, that to maintain this action, the plaintiff should have given the Sheriff a special notice, stating, that the goods were lent for a term only, and that he (the Sheriff) ought not to sell any more than the interest that Greathead had in the goods.

Gurney contended that the Sheriff ought to have seized them in that special

way.

*ABBOTT, C. J. No. Prima facie the Sheriff had a right to seize the whole of the goods entirely, as they ostensibly belonged to Greathead, but if you had apprized the Sheriff of your special rights he would have sold accordingly.

Nonsuit.

Gurney, and Banks, for the plaintiff. Scarlett, and Platt, for the defendant.

[Attornies-Lindsell, and Green & Ashurst.]

BEFORE ABBOTT C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Gurney moved to set aside the Nonsuit, and contended that the entry of the

Sheriff and the taking of the goods were the foundation of the action.

BAYLEY, J. You should have informed the Sheriff of the nature of your interest; then he might have sold *Greathead's* interest only. If the goods were let to *Greathead* from year to year, the Sheriff would be entitled to sell the use of them for a year.

Gurney. Does your Lordship think that was an interest which was seizable?

ABBOTT, C. J. There can be no doubt of that; but it is very desirable that

persons should give their notices correctly.

Rule refused.

The case of Ward v. Macsulay, 4 Ter. Rep. 489, decides, that where a landlord let a bease and furniture on hire to a tenant, and the Sheriff seized the furniture under an execution against the tenant, after notice from the landlord, the landlord could not maintain trespass against him for so doing; and the case of Gordon v. Harper, 7 Ter. Rep. 9, decides, that the owner of goods so let on hire, cannot maintain trover against the Sheriff under such circumstances.

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*IRVING v. GREENWOOD.

In action for breach of promise of marriage, if on the part of the defendant it is proved that the plaintiff is a loose and immodest woman, and that he broke his promise on that account, it goes in bar of the action; but if it also appear that, when he made the promise, he was aware of these circumstances, it is no defence. In such an action the defendant may, in mitigation of damages, go into evidence that his relations disapproved of the match; and if his father is an incompetent witness on account of his having employed the attorney to conduct the defence, a witness will be allowed to prove that he has heard the father express to the defendant his dislike to the marriage.

Breach of promise of marriage.

The promise and the breach were clearly made out. The defendant's counsel wished to show in mitigation of damages, that the father and other relations of

the defendant disapproved of the match.

ABBOTT, C. J., allowed evidence to be given of their disapproval, and the reason they assigned for it; and the father of the defendant being an incompetent witness, because he employed the attorney, his Lordship allowed one of the other relatives to prove, that, in his presence, the father expressed to the

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defendant his dislike to the match, on account of the bad character of the plaintiff.

And in bar of the action, evidence was given to show, that the defendant eventually broke off the match, because he found that the plaintiff was with child by another man.

It was admitted, that, after the promise, the plaintiff had had a child, but it

was contended that the defendant was its father.

ABBOTT, C. J., in his summing up to the Jury, said—If you think that the defendant was not the father of the child, he is entitled to your verdict; for if any man, who has made a promise of marriage, discovers that the person he has so promised to marry, is with child by another man, he is justified in breaking such promise: and if any man has been paying his addresses to one that he supposes to be a modest person, and afterwards discovers her to be a loose and immodest woman, he is justified in breaking any promise of marriage that he may have made to her; but to entitle a defendant to a verdict on that ground, the Jury must be satisfied that the plaintiff was a loose and *immodest woman, and that the defendant broke his promise on that account, and they must also be satisfied that the defendant did not know her character at the time of the making of the promise: for if a man knowingly promise to marry such a person, he is bound to do so.

Verdict for the plaintiff, damages 500l.

Denman, and Brougham, for the plaintiff. Scarlett, Marryatt, and Taunton, for the defendant.

[Attornies-Smith, and Sheen.]

In the case of Leeds v. Cook, and others, 4 Esp. 256, Lord Ellenborough, in an action for breach of promise of marriage, said, that though a promise to marry was proved, yet, if it appeared that the plaintiff was a man who had conducted himself in a brutal and violent manner, and had threatened to use her ill, she had a right to say that she would not commit her happiness to such keeping, and she might set it up as a good legal defence; but his Lordship considered, that the gross manners of the plaintiff only went to the damages, and not to the verdict. And in the case of Baddeley v. Mortlock & Wife, 1 Holt, N. P. C. 151, the defence was, that, previous to the breach of the promise, dishonesty and perjury had been imputed to the plaintiff; and that, the defendant's wife calling upon him to vindicate his character, he said he could do so, but in fact did not, and therefore she broke her promise. Gibbs, C. J., ruled, that, for her to be absolved from her promise, she must show that the plaintiff was in fact a man of bad character. For without proof that the charges were well founded, such charges would only go to the damages. To support this action, the promises must be mutual. But in the case of Sutton v. Mansell, 3 Salk. 10, in an action by a woman against a man, it was held that "her carrying herself as one consenting and approving." was sufficient evidence of her having mutually promised; and in practice no more evidence on that point is ever given. And in Holt v. Ward, 2 Str. 937, it was held, that a promise by one of full age to marry an infant, was binding on the person of full age. A promise to marry is not within the statute of frauds. Corn v. Baker, 1 Str. 34. But an executor or administrator cannot sue upon such a promise made to his testator or intestate. Chamberlain v. Williamson, 2 M. & S. 408. A bill in Equity lies to compel a party to "discover whether he has promise to marry, there should be counts on the exact promise, in addition to the usual counts. But in the case of Potter and Deboos, 1 Star

MONEYPENNY v. HARTLAND et al.

If a surveyor makes an estimate, which turns out to be incorrect, to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover any thing for his plans, specifications, or estimates made for that work.

If the surveyor for the building of a bridge is a shareholder, he can maintain no action, being a partner, though he subscribe "as architect and engineer." Semble, that if the committee employ the surveyor, and under the Act of Parliament, the trustees of the bridge are made liable for the surveyor's bill: the surveyor cannot maintain actions for it against the committee.

Work and labor. Plea-General issue.

The defendants were the committee of the subscribers for building the Mythe Bridge across the Severn. The plaintiff was employed by them as architect and engineer to the work, and he brought this action against the defendants to recover a compensation for his skill and labor in making plans, estimates, and specifications for that work; he was engaged in this during the year 1823, by this committee; but on the 24th of March in that year, a private act passed for the building of this bridge; and from the passing of that act the committee of the subscribers ceased to manage the undertaking, it being after that time carried on by trustees deriving authority from the act.

ABBOTT, C. J. Before an act passes for such a work as this, the surveyor and other persons employed on it, look to the committee or body of adventurers who first employ them, but after the passing of the act, it must be considered that they look to the company or persons made liable under

The Attorney General. Does your Lordship think that the liability shifts?

Abbott, C. J. No; but I take it, that the liability must be considered as not fixed till it is known whether an act will pass or not; but I will leave it as a question to the Jury, whether the credit was not given to the committee in case the proposed act did not pass, and to the company, if it did.

The original deed, signed by the subscribers, for the undertaking of the work, previous to the passing of the act, was put in. It was executed by the defendants and by the plaintiff, who subscribed for 500l. "as architect and engineer." The defence was—First, that the plaintiff was a partner in the undertaking, he being a shareholder to the amount of 500l.; and the case of Holmes v. Higgins, 2 Dow. & Ry. 196, was cited:† and—Second, that, though the plaintiff made an estimate for the bridge, yet he did not bore, or otherwise examine the soil of the foundation, which was afterwards discovered to be bad, which caused an additional expense to the company of upwards of 1600l. In answer to this, it was shown, that, when the committee engaged the plaintiff *as their surveyor, they told him, that a person, whom they named, would assist him with information; and, that that person told the plaintiff that the soil was good, but he did not say that he ever tried it in any way.

ABBOTT, C. J. If a surveyor, who makes an estimate, sues those who employ him for the value of his services, and it appear that he was so negligent, that he did not inform himself, by boring or otherwise, of the nature of the soil of his foundation, and it turned out to be bad; this goes to his right of action: and if he went upon the information of others, which now turns out to be false, or insufficient, he must take the consequences; for every person,

[†] In the case of Holmes v. Higgins, 2 Dow. & Ry. 196, the plaintiff, who had been the agent who had endeavored to carry through parliament, a bill for a rail-way, sued the defendant, the chairman of the committee of subscribers, for the amount of his bill for such his services; but, it appearing that the plaintiff was a subscriber to the undertaking, as well as the defendant, the Court held, that he could not maintain the action in the sheence of an express or implied undertaking by the defendant, that he would make him self personally liable.

employed as a surveyor, must use due diligence. Whether the plaintiff has used due diligence or not, is a question for the Jury; and if the plaintiff went on the statements of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others, or that the fact was uncertain.

Nonsuit.

The Attorney General, and Chitty, for the plaintiff. Marryatt, and Patieson, for the defendant.

[Attornies—Hurd & Johnson, and Jenkins & Co.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, IS.

In Banc.

THE Attorney General moved to set aside the Nonsuit in this case, on the ground, that the plaintiff, having made the plans, estimates, and specifications for this bridge, he was entitled to be paid for them, and that if any extra expense had fallen on his employers, by his want of care, "he was liable to an action for damages. Indeed a part of the plaintiff's claim was money paid by him for journeys down to Gloucestershire, &c.

BAYLEY, J. The plaintiff claims as much as his services are worth, and if he led his employers into a great expense, by his want of care, his services

would be worth nothing.

The Attorney General. If an attorney brings an action for his bill of fees, it is no answer to that action that he was negligent; but an action must be brought against him for such negligence.

ABBOTT, C. J. At the trial, it appeared, that the plaintiff was a subscriber. The Attorney General. As architect and engineer only; therefore his sub-

scription was only conditional.

ABBOTT, C. J. This bridge was built under the authority of an act of Parliament; by that act, the expense of plans and estimates is to be paid by certain trustees: now this action is brought against a committee who managed the work previous to the passing of the act; and, it besides appeared, that the plaintiff had never examined the ground for the foundation, which it was the bounden duty of an engineer to do; and that by this he had put the company to a great expense.

BAYLEY, J. I don't see how the action can be supported against these defendants; for, by the act of Parliament, other persons are made liable.

The Attorney General. An omitted item in an estimate is really no loss.

ABBOTT, C. J. If a man employs a person to make *an estimate, especially no loss who tells his employer that the work will cost 10,000l., and it costs 15,000l., and it appears that the surveyor did not use due diligence, can it be contended that the employer is bound to pay for such information?

LITTLEDALE, J. If the plaintiff was a subscriber, he cannot recover in an action. In a case very lately, an engineer to a rail-road was a subscriber, and it was held, that he could not maintain an action. (Holmes v. Higgins, above

cited.)

ABBOTT, C. J. Without adverting to the subscription, or to the liability of the committee, I think it of the greatest importance to the public, that gentlemen in the situation of the plaintiff, should know, that if they make estimates, and do not use all reasonable care to make themselves informed, they are not entitled to recover any thing. I think, therefore, the Nonsuit was right.

BAYLEY, J. The plaintiff's demand is for one entire account, and if, from his negligence, the whole of his work is worth nothing, he cannot recover for a particular item, as a journey, as it still was a part of an entire claim, relative to this bridge.

The other Judges concurred.

Rule refused.

MONTAGUE v. R. ESPINASSE, Esq.

If articles of jewellery are supplied to a feme covert while she is living with her husband; assumpsit cannot be maintained against her husband, unless he gave some authority, either express or implied; and in viewing this question, the jury may consider whether the articles were suitable to the state and degree of the husband.

Assument for articles of jewellery.

From the evidence on the part of the plaintiff, it appeared, that the goods, consisting of diamond rings, necklaces, and bracelets of various kinds, and a gold watch and chain, were supplied to the wife of the defendant, who is an eminent special pleader, to the value of 831. 6s., in the month of October, 1823; and that the bill was made out in her name; and that the plaintiff's attorney, before the action was commenced, called on Mrs. Espinasse, and told her, that, if the amount was not paid, an action would be brought. It also appeared, that Mrs. Espinasse was a cousin of Lord Petre.

The defendant's counsel contended, that the plaintiff must be nonsuited; because, on this evidence, the plaintiff had proved a sale of the jewellery to Mrs. Espinasse, and that he had given credit to her, and not to her husband.

ABSOTT, C. J. What is there to show that the defendant ever knew of this?

Did he ever see the articles worn?

The Attorney General. Mr. and Mrs. Espinasse lived together, and there-

fore his assent may be presumed.

ABBOTT, C. J. That is so in cases of ordinary goods, but to recover for such articles as these, you ought to prove that the husband saw them worn;

however, the defendant had better go into his case.

The defence was, that the articles in question were ordered without the knowledge of the defendant, and that he never saw them; and it was proved by the defendant's nephew, (Mr. J. Espinasse,) and by the defendant's servants, that they were wholly unnecessary for the defendant's wife, as she possessed as much ornamental jewellery, as ladies of her rank usually possess, before and at the time of this supply; and that, in fact, she never wore any one of these articles: it was also "proved, that the persons from the plaintiff's shop always called at the defendant's house at times of the day when it was known that the defendant was not at his house, but at his chambers: that they uniformly asked for Mrs. Espinasse; and that when the plaintiff's shopman delivered the bill, the servant to whom he delivered it said to him, "How could Mr. Montague trust my mistress so much? I am sure my master does not know it." On which the shopman replied, "We are quite aware of that."

The Attorney General contended, that, if a wife is living with her husband, and articles of dress are supplied to her, suitable to her estate and degree, her husband is liable to pay for them.

ABBOTT, C. J. The law is clear. The question is, whether these goods were bought by the wife, by the authority of the husband; if they were not

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bought by his authority, the plaintiff cannot recover. This authority may either be express, or it may be inferred from the circumstances of the case; and, in this view, the state and degree of the defendant is fit to be considered. It should be observed, that these are all articles of ornament and not of neces sity or use. A lady has generally authority to manage her husband's house, and to order in from the different tradesmen the necessary goods; but these articles were not necessary in any way, nor even wanted by the wife of a private gentleman. The tradesmen generally take the order from the wife, and often send in a bill to her, but when an attorney applies, it is almost uniformly to the husband; and I was surprised at the contrary in this case. Another strong fact is, that it appears, that no one of the articles was ever seen in the possession of the defendant's wife, by persons who must have seen them if they had been at any time worn by her. This goes to show, that the articles were not suitable to the state and degree of her husband; for, if they had been so *she would have worn them; but it seems that they were immediately disposed of. It appears also, that she is related to a family of rank; still it is not the rank of the party, but the estate that must be considered. Persons parting with goods ought to take some care, and if tradesmen are allowed to trust ladies rashly, any man may be ruined; and if tradesmen wish to run no risk on the question, whether the purchase is made by the authority of the husband or not, it is their duty, in all cases where the order is large, to ask the husband, before the goods are supplied, whether the order was given by his authority or not? In short, the question is, were these goods supplied by the authority of the husband or not? If they were, then and then only is the plaintiff entitled to a verdict.

The jury after some consultation asked his Lordship for further directions.

ABBOTT, C. J. The question is, did the husband give any authority, either express or implied, for the making of this purchase? And to assist you (the jury) on that question, you may consider whether the articles were suitable to the estate and degree of the defendant's wife; however, if they had been suitable, she would have worn them, which it is plain she never did.

Verdict for the plaintiff.

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The Attorney General and Platt, for the plaintiff. Gurney, and Lawes, for the defendant.

[Attornies—C. Gill, and Hickes & D.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Gurney moved for a new trial on the ground, that the *question left by the Lord Chief Justice to the jury, was, whether the goods were furnished under such circumstances as to allow them to presume that they were supplied by the authority of the defendant? and that, upon the evidence, the jury ought to have found for the defendant.

The Court granted a rule to show cause.

See the cases of Etherington v. Scott, 1 Salk. 128, and 2 Ld. Raym. 1006: Bolton v. Prentice, 2 Str. 1214; Manby v. Scott, 1 Lev. 4, 1 Sid. 109, 1 Mod. 125; Harris v. Morris, 4 Esp. 41; Bentley v. Griffin, 5 Taunt. 356; Waithman v. Wakefield, 1 Camp. 120; Met calf v. Shaw, 3 Camp. 22; Holt v. Brien, 4 B. & A. 252.

MAYNARD v. --- RHODE, Esq.

When an insurance is effected on the life of a third person, by a creditor, and misrepresentations are made by the party whose life is insured, of the state of his health: this will vitiate the policy, though the creditor for whose benefit the policy was effected, was ignorant of the representations being false, and though the party did not die of the disease he was then afflicted with.

Action on two policies of insurance effected by the plaintiff at the *Pelican Insurance Company*, (to which the defendant was secretary,) on the life of Colonel *Lyon*, to whom the plaintiff was an annuity creditor. One of the policies was dated on the 16th of *May*, 1823, and was for 690*l*., the other was dated on the 17th of *June*, and was for 650*l*.

Colonel Lyon died in October, 1823, of a bilious remittent fever. The exe-

cution of the policies was admitted, and also the plaintiff's interest.

The defence was, misrepresentation and improper concealment on the part

of Colonel Lyon, previous to the effecting of the policies.

To substantiate this defence, it was proved that the office, previous to the *361] execution of the policies, sent a *number of printed questions to Colonel Lyon, for him to answer: among which were the two following:—
"Who is your medical attendant?" To which Colonel Lyon answered, "I have none except Mr. Guy, of Chichester;" and "Have you'ever had a serious illness?" To this he answered, "Never!" Mr. Guy was referred to, and he gave it as his opinion that Colonel Lyon was an insurable life. But it was proved that Mr. Guy had not been called on to attend him for three years previous to his giving his certificate; but that, in the year 1823, Colonel Lyon was attended, from the month of February to the month of April, by Dr. Veitch, a physician, and Mr. Jordan, a surgeon, for an inflammation of the liver, and a fever, and determination of blood to the head. The former of these gentlemen proved that he considered him to be in a dangerous way, and that he prescribed active medicines, and ordered him sometimes sixteen leeches aday; and that he would not have certified him to be in health till the end of the month of May. It was, however, agreed on all hands, that the disease of which he died, had no relation to any of the complaints for which these gentlemen attended him.

Аввотт, С. J. The question is, whether any wilful misrepresentation or suppression of the truth took place on the part of Colonel Lyon, to induce the office to effect these policies; and the jury must consider whether the reference to Mr. Guy, when he was daily attended by a physician and surgeon in town, was intended to prevent a disclosure of his real state of health? For, if he referred to Mr. Guy, because he would speak well of his health, and thought that, if he referred to the other medical men, they would not so certify, though he did not die of the disease he was then afflicted with, I am clearly of opinion, that the defendant is entitled to a verdict. And if the reference was made to Mr. Guy. because he did not know the Colonel's latter state of health, this is such a *misrepresentation as will avoid the policies. And though the party here was an annuity-creditor of Colonel Lyon, yet, if he allowed the Colonel to make these representations when the policy was effected, he is bound by them; and, however hard it may be on the plaintiff, the rules of law must be adhered to.

Verdict for the defendant.

Scarlett, Marryatt, and Chitty, for the plaintiff.
The Attorney General, Gurney, and F. Pollock, for the defendant.

[Attornies-Rogers & Son, and Dawes & Chatfield.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J&

In Banc.

Scarlett moved for a rule nisi, for a new trial, and contended that, however a misrepresentation or a concealment of the state of facts by the insured might invalidate the policy, yet here the insurer and insured knew equally little of the fraud; and he therefore submitted, that a fraud committed by a third person would not affect the policy; more especially, as the Insurance Office made their own inquiries into the facts.

BAYLEY, J. Are there not the usual representations in the policy?

Scarlett. There are, my Lord; but though I admit that if Colonel Lyon had procured the insurance, the policy would have been clearly void; yet the present plaintiff Maynard was entirely innocent of the fraud, and therefore ought not to be prejudiced; yet the Lord Chief *Justice laid down, that, if the representations were falsely made by Colonel Lyon, without the privity of the plaintiff, they avoided the policy.

BAYLEY, J. The representation is made part of the policy, and, therefore, the bargain is only conditional; and it is equally a condition in the policy, let

it be made by whomever it may.

Holroyd, and Littledale, Js., concurred.

Rule refused.

WATSON v. BEVERN.

The Judge at a trial will not compel a witness to say where he lives, if he states that he believes that a bailable writ is out against him, at the instigation of the party whose counsel had put the question.

ACTION for a sum of money agreed to be paid to the plaintiff, in consideration that he would give up a house.

The defendant's counsel, in the cross-examination of one of the witnesses,

asked him where he lived.

The witness wished to decline answering this, as he believed a bailable writhad been sued out against him, at the instigation of the defendant.

The defendant's counsel submitted, that they had a right to an answer, as they wished to show that the witness had lived in various places, under particular circumstances; and that, if he was the person that they were instructed he was, they had witnesses to call.

ABBOTT, C. J. As he says, that he wishes not to answer, because a bailable writ is out against him, at the instigation of the defendant, I think he need not answer; and any witnesses that you have may see him here.

*The witness, therefore, did not answer the question.

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Gurney, and Chitty, for the plaintiff, Scarlett, and Abraham, for the defendant.

[Attornies—Hodgson & B., and Watson.]

ADJOURNED SITTINGS AFTER TRINITY TERM, GUILDHALL.

BEFORE LORD CHIEF JUSTICE ABBOTT.

BEVERIDGE v. MINTER et al., Executors of MINTER, deceased.

The widow of a deceased person is a competent witness for the plaintiff, in an action brought against the executors of such person, on a promise made by him in his lifetime.

This was an action to recover a sum of 150l. which the defendant's testator,

in his lifetime, under special circumstances, promised to pay to the plaintiff.

The widow of the testator was called by the plaintiff, to prove certain admissions of her deceased husband, relative to the money in question.

Scarlett, for the defendants, objected to her being examined.

ABBOTT, C. J. She is appearing against her own interest. This is an action brought against her husband's executors. If you had called her, the other side would have asked if she took any benefit under the will.

Scarlett. If her husband had been alive, and the action had been brought against him, she could not have been a witness: and can she now charge his estate?

ABBOTT, C. J. At present I do not see any objection.

*The witness was then examined, and clearly proved a promise: but a verdict was taken for the defendants, on the ground, that, upon the facts of the case, there was no consideration for such a promise.

The Common Serjeant, and Campbell, for the plaintiff.

Scarlett, and Prendergast, for the defendants.

[Attornies-W. Dimes, and Sutcliffe.]

BLOW v. RUSSELL.

An offer of a 10% note to a collector appointed by the solicitor to a commission of bankrupt, for the payment of 41. 14s. 6d., the sum demanded being 11l. 4s. 6d., is not a good
tender in substance; the collector having no discretion on the subject: and if he had
such discretion, it is doubtful whether the tender would be good, even in point of form.

This was an action, by the assignee of a bankrupt, to recover the sum of 111. 4s. 6d.

The defendant pleaded that he was not liable as to all, except the sum of 41. 14s. 6d., of which he pleaded a tender. To prove the tender, a witness He stated that he was employed by the solicitor named Cox was called. under the commission to collect the debts due to the estate. When he called on the defendant, the defendant pulled out a 10% note, and offered to pay 4%. 14s. 6d., and asked for change; the witness replied, that he was not authorised to take less than the sum demanded, viz., 111. 4s. 6d., but did not make any objection to the note.

Scarlett, for the plaintiff, submitted, that this was no tender, as the witness

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Cox, had no discretion. To make it a good tender, the money should have

been offered to the assignee, or to the solicitor.

ABBOTT, C. J., allowed the objection; and observed, in addition, that, if Cox had had authority to exercise a *discretion, he should have been doubtful whether the tender was a good one, in point of form.

Verdict for the plaintiff.

Scarlett, and Manning, for the plaintiff.
The Common Serjeant, for the defendant.

[Attornies—T. H. Nicholls, and Collins.]

Bank notes are not a good tender, if objected to at the time; but if they have been offered, and no objection made on that account, the Court of King's Bench has considered it a good tender; per Buller, J., in Wright v. Reed, 3 T. R. 554. The money, to make it a good tender, must be produced, unless the other party dispense with its production. Lord Kenyon lays down, (Peake, Rep. 88.) that the offer of a larger sum, with a request for change, is a good tender, if no objection is made on that account. And this was also decided, in the case of Tadman v. Lubbock, Mich. T., 1824, where a tender of 11. 13s. was pleaded. The evidence was, that the party offered two sovereigns, and asked for change; the other party refused the tender, on the ground, that more than 11. 13s. was due. The Court of King's Bench held this a good tender.

BARNARD et al., Assignees of THURTELL, v. HOW.

A horse was kept at the defendant's stables; and one day, when he was from home, three or four of his servants being in charge of the premises, the horse was taken away. The defendant blamed his ostlers for letting it be taken; but on being himself remostrated with, replied, that it was of no consequence, because he was indemnified. Held, that in such case, trover would not lie.

TROVER for a horse. Plea—Not guilty. The deposition of the defendant, taken before the commissioners of bankrupt, was put in and read; from which it appeared, that he was a livery stable keeper; and that the horse in question was kept at his stables, by Thurtell, the bankrupt; and that one day, on his (the defendant's) *return from Epsom, he found that a man named Cooper had taken the horse away; and he, in consequence, "remonstrated very severely" with the ostler, for letting the horse go without his consent.

It appeared further, from the evidence of one of the defendant's ostlers, (who saw Cooper riding the horse away, close by the defendant's premises,) that he (the witness) had but a short time before left three or four of the defendant's servants in the charge of the stables.

The defendant, when the horse was demanded, said it was in the hands of *Cooper*; and on being told that he should not have suffered *Cooper* to take away another person's horse, replied, that it was of no consequence, as he was indemnified.

Marryatt, for the defendant. There is no evidence of conversion; at most, it was only negligence in the servant, which may be the ground of an action on the case.

ABBOTT, C. J. On this evidence, certainly, it appears that the horse was taken away without the knowledge or consent of the defendant.

Gurney, for the plaintiff. That is not to be presumed, when the defendant's own expressions are considered; and when it is remembered that there were three or four persons in the care of the premises at the time.

ABSOTT, C. J. It appears, on the evidence, that the horse has been got away by Cooper; and that his taking it might, and ought to have been prevented by the defendant's servants; but, unless they concurred, Cooper was a trespasser; and the defendant is not liable in trover, though he may be in another form of action.

The plaintiff was then nonsuited.

*368] *Gurney, and Steer, for the plaintiff.

Marryatt, and Comyn, for the defendant.

[Attornies—Hewitt, and Jones & B.]

DAVID v. ELLIS et al.

The funds of a former partner in a firm, which, at the time of his retiring from it, was indebted to a person on a balance of account, are still liable to such person, although he knowingly suffered such balance to remain at interest in the hands of the altered firm, and drew a bill for a certain sum, expressly on the credit of that balance; and wrote letters declaring his confidence in such firm, even after a suspension of payments by them.

This was an action for money had and received, and on an account stated. The facts of the case were these:—The plaintiff, who is a merchant at Montreal, had, for several years prior to April, 1821, had dealings with the firm, in England, of Ellis, Inglis, & Co. At that time, Mr. Ellis withdrew from the firm, and the fact of his having done so was announced to the plaintiff by a circular letter, dated the 30th of April, 1821; which stated that the business would be carried on by the remaining partners, who charged themselves with the debts of the old firm. On the 28th of June, 1821, the plaintiff wrote, acknowledging the receipt of the letter advising the change in the firm, and stating that it continued to have his confidence. An account was made out up to the 30th of June, 1821, in which the balance in favor of the plaintiff was stated at 18,000l. This was sent in a letter dated 17th of July, 1821, which notified, that that sum had been placed to the credit of the plaintiff, in a new account with the then firm. It did not appear that any new books were opened. On the 24th of September, 1821, the plaintiff wrote again, stating that the account was perfectly correct, with a very trifling exception, and that he had transferred the balance in a new account with the altered firm. On the 17th of August, 1822, Mr. Inglis died, and the firm suspended payments, and on the 23d of September, became *bankrupt. In the month of October, 1822, the plaintiff wrote, and required payment of part of the money due; stating that he considered, that Ellis & Co. were liable to him. Previous to this, he had written, expressing the continuance of his confidence in the firm, though he had heard of Inglis's death, and the suspension of payments. also appeared, from a second account current, that the plaintiff, while the 18,000%. was at interest with the new firm, drew a bill for 5000%. on that firm; which he said he had transferred on the account of that fund, and which was accepted and paid.

The question was, whether, under these circumstances, the funds of *Ellis* were discharged from the plaintiff's debt.

Gurney, for the plaintiff, contended, that they were liable, notwithstanding the notification of the change.

Scarlett, for the defendant, argued that the plaintiff's suffering the 18,000L

to remain at interest in the hands of the new firm, and drawing a bill for 5,000l. on that fund, together with his expressing his confidence in the firm, after the suspension of payments, discharged *Ellis* from his liability.

ABBOTT, C. J. My present opinion is, that Mr. Ellis is not released, but that he is entitled to the benefit of the subsequent payments. I treat it all as

one continued concern.

The verdict was for the plaintiff, for 13,160l., and Scarlett had leave to move to enter a nonsuit.

In Michaelmas term, Scarlett moved, pursuant to leave given at the trial, and the Court granted a rule to show cause.

*Gurney, and Campbell, for the plaintiff. Scarlett, for the defendant.

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[Attornies-Gordon, and Healing.]

----AUSTIN, Esq. v. WARD.

If a levy is made by the sheriff, and the proceeds paid to the execution creditor, and trover is brought by the assignees of the person against whom the execution issued, he having become bankrupt: if the sheriff suffers judgment in such action to go by default, he cannot recover back from the execution creditor, the money he has paid him, if he (the sheriff) could have made a good defence to the action brought against him by the assignees, even though he gave notice to the execution creditor, that he would defend the action, if the execution creditor would furnish the grounds and means for his so doing.

Assument for money paid, and money had and received.

The plaintiff was sheriff of Kent, and this action was brought to recover the sam of 52l. 14s. the amount of a levy made by his officer on a fi. fa. in a cause in which the present defendant was plaintiff, and one Jagger Ansel defendant, and which amount, after it was handed over to Ward's attorney, the sheriff was compelled to pay again in an action of trover, brought by the assignees of Ansell, who was alleged to have committed an act of bankruptcy previous to the levy.

Scarlett, in his opening speech for the plaintiff, cited the case of Wilson v.

Milner,† to show that the action was properly brought.

*It appeared, that the sheriff, in the action of trover, suffered judgment to go by default; but previous to his so doing, the following notice was sent by his attorney to the defendant in this case, Mr. Ward.

"SIR.

- "I do hereby give you notice, that an action has been brought against the Sheriff of Kent, by the assignees, under a commission of bankrupt, awarded
- † Wilson v. Milner, 2 Camp. Rep. 452. If a levy is made on the goods of a trader, after he has committed an act of bankruptcy, and the money levied is paid over to the party; and an action of trover is afterwards brought by the assignees against the Sheriff and the Bailiff, in which damages are recovered: and these, together with the costs, are paid by the Bailiff: Held, that there is no implied promise on the part of the plaintiff in the original suit to indemnify the Bailiff, or to contribute to the damages and costs if the action of trover; but that the Bailiff might maintain money had and received, to recover back the levy money paid over.

and issued forth against Jagger Ansell, of Deptford, to recover the value of the goods sold under the execution issued against the said Jagger Ansell, at your suit, and the proceeds of which sale have been paid over to you, or your attornies. And I do hereby give you further notice, that the said Sheriff is ready and willing to defend the said action, provided you will furnish the grounds and means for his so doing; otherwise, he will suffer judgment to be entered against him by default.

"(Signed)

"Thomas Minchin,
"Defendant's Attorney."

On the examination, in the present case, of the bankrupt's son, who was called to prove several acts of bankruptcy, it appeared doubtful, whether or no the denials to creditors relied on to support them, were not the result of previous arrangement.

ABBOTT, C. J., left it to the Jury, to say, whether these were concerted acts of bankruptcy or not; and if they found them to be so, they ought to find a verdict for the defendant. With respect to the first question, his Lordship held, that the present proceeding was the same as trying the action against the Sheriff; and that, if the Sheriff could have set up as a defence, that the assignees had no right to recover against him, in the action of trover, he was not entitled to recover now, against the *defendant, notwithstanding the notice he had given to the defendant.

Verdict for the defendant.

Verdict for the plaintiffs.

Scarlett, and Jones, for the plaintiff.
Gurney, and Campbell, for the defendant.

[Attornies-T. Minchin, and Dickinson & S.]

In Michaelmas term, Scarlett moved for a new trial, and the Court granted a rule to show cause.

HURD et al. v. MORING.

A knowledge of a client's handwriting, obtained by his attorney, from having witnessed his execution of the bail-bond, in the action, is not such a confidential knowledge, as to privilege the attorney from answering, when called on the part of the plaintiff, to prove the defendant's handwriting, on the trial.

Action on a bill of exchange, against the defendant as drawer.

The attorney for the defendant was called, to prove his handwriting. He objected, on the ground that he was only acquainted with it from having seen the bail-bond signed, and as that was a proceeding in the cause, he therefore ought not to state the result of knowledge that he had acquired as attorney in the cause

ABBOTT, C. J. Was of opinion that there was nothing in the objection, and directed the witness to answer.

Scarlett, and Chitty, for the plaintiffs. Platt, for the defendant.

[Attornies—Hurd & J., and Eicke.]

*BERESFORD v. BIRCH.

Interest at 201. per cent. given by the 49 Geo. 3, c. 121, s. 4, in the case of assignees of a bankrupt wilfully retaining a balance, cannot be recovered in assumpsit, on the common money counts.

Whether the assignee ought not to be charged by the commissioners with such interest,

before any action is brought-Quere.

Action for money had and received, and on account stated.

The plaintiff claimed a sum of money, together with interest, at the rate of 20l. per cent. in pursuance of the statute, 49 Geo. 3, c. 121, s. 4, which enacts that if the assignees of a bankrupt shall retain in their hands, or otherwise employ for their benefit, any money, part of the bankrupt's estate, contrary to that Act, and the 5th Geo. 3, c. 30, they shall be charged in their accounts interest at the rate of 20l. per cent. per annum, on all money so retained, for the time it is so retained, contrary to the said acts; and that the commissioners shall charge such assignees with such sum accordingly.

The Counsel in the cause requested the opinion of the Court, whether, on the common counts, this amount of interest could be recovered? as it did not appear, that any thing had been done by the commissioners on the subject.

ABBOTT, C. J. I think, in order to charge a man with interest, at 201. per cent., there should be a count framed upon the act. If, indeed, it applies to the case of an action, and is not merely directory as to what is to be done, when the matter is before the commissioners, I should think it a case for 51. per cent. interest. But this interest at 201. per cent. is in the nature of a penalty; and I think you must declare specially, as for a penalty. If the commissioners had settled an account, and charged the defendant with such interest, then the case would have been different.

A verdict was then taken for the plaintiff, for the principal sum, subject to a motion to augment *it, by adding the interest at 201. per cent. But no motion was made in the subsequent Michael-

F. Pollock, for the plaintiff. Parke, for the defendant.

[Attornies—Leigh, and Hurd & J.]

This action was brought on the statute 49 Geo. 3, c. 121, s. 4, which enacts, that "in all cases in which any assignee or assignees of any bankrupt's estate, shall wilfully retain in his or their hands, or otherwise employ for his or their own benefit, any sum or sums of money; part of the estates of such bankrupts," contrary to the directions of the 5 Geo. 2, c. 30, or of this act, "he or they shall be charged in his or their accounts with the estates of such bankrupts, with such sum or sums of money as shall be equal to the amount of interest, computed at the rate of 201. per centum, per annum, on all such sums of money, so retained or employed by him or them; for the time or times during which he or they shall have so retained or employed the same, contrary to the said direction of either of the said acts: and the commissioners of bankrupts are hereby required to charge such assignee or assignees, in their accounts, with such sum or sums of money accordingly."

The foregoing enactment is repealed by the statute 5 Geo. 4, c. 98, which passed to continue the sum of the statute of the

The foregoing enactment is repealed by the statute 5 Geo. 4, c. 98, which passed to consolidate the bankrupt laws. It may therefore be proper to state the section of that statute, which regards cases of this kind.—5 Geo. 4, c. 98, s. 99, enacts, "that if any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ, any sum to the amount of one hundred pounds or upwards, part of the estate of the bankrupt, or shall neglect to invest any money in the purchase of Exchequer bills, when so directed, as aforesaid, (by the commissioners,) every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of 201. per cent. on all such money, for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed, as aforesaid, or during which time, he shall have so neglected to invest the same in the purchase of Exchequer bills; and the commissioners may charge every such assignee in his accounts, accordingly." *Though these two enactments are in many [*375 respects the same, yet there are some very important differences, which made it necessar to state both. The statutes repealed by the 5 Geo. 4, c. 98, are:—34 & 35 H. 8, c.

4; 13 Elis. c. 7; 1 Jac. 1, c. 15; 21 Jac. 1, c. 19; 13 & 14 Car. 2, c. 24; 10 Ann. 15; 7 Geo. 1, statute 1, c. 31; 5 Geo. 2, c. 30; 19 Geo. 2, c. 32; 24 Geo. 2, c. 57, s. 9 & 10; 4 Geo. 3, c. 33; 36 Geo. 3, c. 90, s. 1 & 2; 37 Geo. 3, c. 124; 45 Geo. 3, c. 124, s. 1 & 8; 46 Geo. 3, c. 135; 49 Geo. 3, c. 121; 56 Geo. 3, c. 121; 56 Geo. 3, c. 137; 1 Geo. 4, c. 115; 3 Geo. 4, c. 74; 3 Geo. 4, c. 81: and, instead of these, new provisions are enacted in this statute, which consists of 133 sections: but this act is not to come into operation, till the lat of May, 1825, except that certificates of persons becoming bankrupt before this act, or before that day, "shall take effect upon the passing of this act."

PETER v. HANCOCK.

On an inquiry in an action for *crim. con.* into the circumstances of the defendant, the executor of a deceased relation is bound to answer a question, which requires him to state the amount of property the defendant acquired under the will of his testator.

This was an action against the defendant, for criminal conversation with the

plaintiff's wife.

The executor of the defendant's uncle was called to prove the defendant's situation in life; and he stated, that the defendant was a wholesale grocer, in an extensive way of business, and that he believed him to be in good circumstances. He was then asked what property the defendant acquired on the death of his uncle. He appealed to the Court, to say, whether, as an executor, he was bound to answer questions concerning his testator's property.

ABBOTT, C. J. I cannot see any reason why you should not answer this question. I do not say that an executor is bound to answer all questions; but there is no reason, why you should not answer this; and therefore you must

answer it.

Scarlett, Campbell, and Brougham, for the plaintiff.

*376] *The Attorney General, the Common Serjeant, and Ryan, for the defendant.

[Attornies—Nind & C., and Gatty & Co.]

PARKINS et al. v. MORAVIA.

Whether an undertaking to pay the plaintiffs the amount due from defendant to Mr. B., for work to be done by Mr. B., in consideration that plaintiff will advance money to Mr. B., is a guaranty?—Quere.

Whether an agreement in a series of letters, containing less than one thousand and eighty words, requires a stamp of 11. 15s.—Quere.

The declaration stated, that, in consideration that the plaintiffs would dissount a bill of exchange for 1200l. for a person named *Benjamin*, the defendant undertook to pay them such sum of money as should be due from him to *Benjamin*, for work done within a specified time. The undertaking was as follows:—

"3, Old London-street, 3d June, 1822.

" Messrs. Parkins & Co.

"Gentlemen,

"I engage to pay you the amount which shall be due from me to Mr. Benjamin, for any work he shall do for me, between this and Christmas next. "Gentlemen,

"Yours most truly,
George Moravia."

Underneath it was the following letter-

"Sir,

"By the enclosed note, you see Mr. Parkins's conditions, you will therefore, if you think proper, sign the above note to them.

" I am, Sir,

"Yours very respectfully,

"Nathaniel Benjamin.

"Addressed to George Moravia, Esq."

*The note enclosed was in these terms-

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" Mr. Benjamin,

" Sir,

"We shall be willing to assist you to the amount proposed, if Mr. Moravia will take the trouble of writing us a line, to say, that the money he will have to pay you for work to be done to Christmas shall be given us.

"We are,

"Your humble servants,

"June 3d, 1822.

"Edward Parkins & Co."

The charge for work done, was 450l.

The Attorney General, for the defendant, contended, that this was a guaranty, and therefore within the Statute of Frauds; and if so, the consideration was not set out in the writing itself, nor in any paper referred to by it: and he cited Boydell v. Drummond, 11 East, 142.

Parke, for the plaintiff, cited Wilson v. Coupland, 5 B. & A. 228; and

argued that it was an assignment of a chose in action.

Abbott, C. J. It is an assignment of a thing not in esse. Wilson v. Coupland is not like this case: you must show on the agreement what the nature of the thing to be performed is, and what the consideration for it.

Scarlett, for the plaintiff. It is an original contract. *"I undertake to pay you such money as shall be due," and does not come under the

Statute of Frauds.

ABBOTT, C. J. It is to go to reduce the bill, and therefore it is to answer for the debt of another.

Scarlett. That is the effect of it, but not the contract.

ABBOTT, C. J. 'Then, if you take it so, being on the discount, it would be usurious.

Scarlett. This is an undertaking by the defendant, to pay the debtor's money, and not to be answerable out of his own funds, therefore the object of the Statute of Frauds has no existence here.

Another question was then raised, as to the amount of stamp-duty required,

[†] Where the plaintiffs were creditors, and the defendants debtors to T. & Co., and by consent of all parties an arrangement was made, that defendant should pay to plaintiffs the debt due from them to T. & Co. It was held, that as the demand of T. & Co. on the defendants was for money had and received, the plaintiffs were entitled to recover, on a count for money had and received, against the defendants.

and a verdict was taken for the plaintiff, subject to the two points of law, in order that the opinion of the Court above might be had on them, on a motion to enter a nonsuit.

Scarlett, and Parke, for the plaintiffs.
The Attorney General, for the defendant.

[Attornies-Deane, and Swaine & Co.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

The Attorney General moved to enter a Nonsuit, pursuant to the leave granted at the trial, and contended that the engagement was to pay the debt of another, and therefore the consideration must be set out according to the case of Wain v. Warlters, 5 East, 10; and that, if the *consideration is mentioned in one paper, and the contract is on another, unless there is a clear reference, it will not be sufficient. Boydell v. Drummond, 11 East, 142. The words of the Statute of Frauds are as general as they can be; and the circumstance, that the debt is to be paid out of a particular fund, can make no difference.

ABSOTT, C. J. You objected at the trial, to the stamp, as well as on the Statute of Frauds.

The Attorney General. Yes, my Lord, if an agreement is contained in a series of letters, one letter only may be stamped; but I contend, that, under the words of the Stamp Act,† the stamp must be 11. 15s. and not 11.

LITTLEDALE, J. Do the letters contain altogether more than 1080 words? for if they do not, it will be a question whether the 1l. stamp is not as much

as is required.

The Attorney General. My Lord, the letters do not contain more than 1080 words; but I contend, that, on the wording of the Stamp Act, the 1l. 15s.

stamp is still necessary.

*380] The Court intimated that they would grant a rule to *show cause, but suggested that it would be better to raise the questions on a special case. The parties adopted the suggestion. The special case has not yet been argued.

[†] The Stamp Act, 55 Geo. 3, c. 184, under the title, Agreement, in the Schedule, part 1; after stating that any agreement under hand only, where the same shall not contain more than 1080 words, shall have a stamp of 1l., and where it shall contain more than such number of words, it shall have a stamp of 1l. 15s., and for every entire quantity of 1080 words over and above the first, a further progressive duty of 1l. 5s., proceeds as follows;—*Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1l. 15s., although the same shall in the whole contain twice the number of 1080 words, or upwards.*

MILLIKIN, Assignee of De MEILLHEIM, a Bankrupt, v. BRANDON.

If it is proved in an action by assignees, (where the trading comes in question,) that the bankrupt bought, and represented himself, as a dealer, and offered goods in exchange; though there is no distinct proof of his ever having sold, it is not ground of nonsuit, but ought to be left to the jury. But if there be distinct proof, that he bought in connection with others, to carry on a system of fraud, by making away with the goods, and never selling any of them, it is not a trading within the bankrupt laws; and the Judge will nonsuit the assignees.

Trover for a quantity of swords.

It was proved that the bankrupt ordered goods, as he stated, for the purpose of sending abroad; and he said, that he would give other goods in exchange or them.

Marryatt, for the defendant, submitted that this did not constitute proof of crading; it was proof of buying, but not of buying and selling; and if this evidence was sufficient, it would be making a man a trader by his declarations, and not by his acts.

ABBOTT, C. J. I cannot say that, if a man buys, and represents himself as a dealer, and offers goods in exchange, that he does not buy to sell again. At

least, I must leave it to the Jury, I cannot nonsuit upon it.

It appeared afterwards from the evidence on the part of the defendant, that the bankrupt ordered the goods in question, in this cause, for the purpose of sending them to *Cadiz*. He was to pay for them in bills at two or three months, at the banking-house of *Cox & Biddulphs*.

The bankrupt's brother stated, that he was almost sure that his brother never had any correspondence with *Cadiz*. That he had seen large quantities of goods come by wagons to his brother's in the morning, which were carried away in the night in hackney coaches; and that he was not *able to swear that he ever saw his brother sell any thing. It also appeared that at the time of the ordering of the goods, his account at the banker's was overdrawn, and never was in credit afterwards.

ABBOTT, C. J., upon this, observed—there is no evidence that this person was buying and selling goods. If he was buying in connection with others, to carry on a system of fraud, it is not a trading to bring him within the bankrupt

Scarlett, for the plaintiff, then elected to be

Nonsuited.

Scarlett, for the plaintiff.

Marryatt, and Gurney, for the defendant.

[Attornies-James Taylor, and Rogers & Son.]

GALE v. DALRYMPLE.

In assault and battery and imprisonment, the defendant justifies the whole as master of a ship, in which the plaintiff was a sailor, and refractory; and the plaintiff reply de injuris. If, by the evidence, it appears that the defendant improperly knocked the plaintiff down, in addition to putting him in irons, the plaintiff cannot recover: as, if he meant to admit that all was proper except the knocking down, and to proceed for that only, he should have new assigned.

Assault and false imprisonment.

The defendant pleaded, 1st, the general issue-Not guilty; and 2d, that he

was master of a ship called the *Vansittart*; of which the plaintiff was a mariner, and that the plaintiff misconducted himself, and was riotous and drunk; and in consequence, he, the defendant, caused him to be put in irons, and to be moderately chastised. Replication, that the defendant committed the acts complained of, of his own wrong, and without the causes assigned.

*In addition to proof of putting in irons and flogging, it appeared in evidence, that the defendant knocked the plaintiff down while he was in a boat going from another ship to his own, just previous to the imprisonment

complained of, and for the same cause.

Gurney, for the plaintiff, submitted, that the justification did not go to that

part of the complaint.

ABBOTT, C. J. If the plaintiff meant to acknowledge that the whole was proper except the knocking down in the boat, he ought to have new assigned. The justification applies to the whole.

Verdict for the defendant.

Gurney, and E. Lawes, for the plaintiff. Scarlett, and F. Pollock, for the defendant.

[Attornies—Flower, and Gordon.]

HALL et al., Assignees of HARRIS, a Bankrupt, v. BARNARD, et al.

The Assignees of a bankrupt may maintain trover for bills of exchange sent by him to one of his creditors after committing an act of bankruptcy, though he being a bill-broker had merely lent money on them, and had not either discounted, or given the full value for them.

TROVER to recover certain Bills of Exchange.

The bankrupt was a bill-broker, and the defendants were bankers. The bankrupt, after he had committed an act of bankruptcy, had sent these bills to the defendants, who were creditors; but it appeared, that the bankrupt had only lent money on some of the bills, and had not either discounted or paid the full value for them.

*383] Marryatt, for the defendants, contended, that these were *not his property, so as to enable the assignees to maintain trover for them.

ABBOTT, C. J. He has a *lien* on them to a certain extent, which passes to the assignees, and enables them to recover the bills from a wrong doer. Whether they can keep the whole amount, is quite another thing.

Verdict for the plaintiffs.

The Attorney General, the Common Serjeant, and Holt, for the plaintiffs. Marryatt, for the defendants.

[Attornies—Hartley, and Parnell.]

Trover is maintainable against strangers by a person who has only a special property in the goods, as by carriers or bailees, Arnold v. Jeffreson, 1 Ld. Raym. 275; or by the finder of a jewel, the real owner being unknown, Amory v. Delamires, 1 Str. 505; or by a person having a temporary property in the goods, Roberts v. Wyatt, 2 Taunt. 268: and in Webb v. Fez, 7 Ter. Rep. 396, Lord Kenyon lays down, that a special property in the case of persona'ty may be in one, as in the instance of carriers, while the absolute right to it may exist in another; when a competition arises between those two persons, the right of the latter must prevail; but as against all other persons a special property is sufficient. In that case, an uncertificated bankrupt had brought trover for goods acquired by him since his bankruptcy, and which he had been possessed of without denial of his essigness, and the Court beld the action to be maintainable.

*COURT OF COMMON PLEAS.

SITTINGS AT GUILDHALL, IN TRINITY TERM, 1824.

BEFORE LORD CHIEF JUSTICE BEST.

HAMOND v. HOLIDAY.

If the duties of a sworn broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble.

Assumest by the plaintiff, a sworn broker, against the defendant, a part

owner of a vessel called the Traveller, for his commission.

The plaintiff's clerk proved that he saw the defendant repeatedly about getting the Traveller chartered, through a Mr. Lancaster. He showed the desendant a former charter party, which he read, and the desendant said he had no objection to go on the same terms, but he would see the plaintiff on 'Change about it. The defendant signed the following paper, as did also Mr. Lancaster.

"The Traveller, 264 tons, will proceed from hence to Pernambuco or Bahia, both or either, taking out goods freight free, the parties paying the charges. To sail on or before the 10th of March."

The witness further stated, that he saw the defendant afterwards, and asked him if he had got fixed, and he said "yes;" upon which bills were printed. The witness, the day after this interview, went to him, and asked him, why he did not bring the papers to get the ship entered? He said, he should not go, he had got a better charter. The witness told him he had signed the agreement. He replied it was not binding, because it was not on a stamp. witness saw him again the day following, and on his saying that he could not go unless the Consulage was *paid, told him that the plaintiff would pay [*385] it out of his commission, if there was no other difficulty.

Lancaster was then called, and stated, that he signed the memorandum on the faith of the broker's saying that the other terms of the charter party, shown to the defendant, would be complied with; that there was a difference between him and the defendant on account of the latter refusing to pay the consular charges on the home cargo; (the witness being liable to pay all the charges of the outward cargo, because he was to pay no freight;) and that the defendant denied at first having seen the charter party referred to; but afterwards, in consequence of the plaintiff's assertion, acknowledged that he had

seen it.

BEST, C. J. How can we judge what the terms are, unless from the signed paper; and it is there stated, "the charges" are to be paid; that must be, all the charges.

Pell, Serjt. The paper was signed after the view of the charter party.

The broker showed the charter party to the defendant.

BEST, C. J. The broker should have specified it. I think the plaintiff is entitled to nothing.

Pell, Serjt. I submit, that he is entitled to his commission.

BEST, C. J. No; not when the bargain goes off.

Pell, Serjt., then cited the case of Haines v. Brisk, 5 Taunt. 521, t on the

part of the plaintiff.

*Best, C. J. That is a very different case from the present. The only point there was, whether the voyage could be legalized. In this case, the defendant says, the plaintiff has made such a bungling bargain, that he is not entitled to recover. The law, as it relates to commission, I take to be this—a man must complete the thing required of him, before he can be entitled to charge for it: but although he does not do the whole, yet he may be entitled to remuneration in proportion to what he has done.

A witness then proved, that, according to the usages of trade, when a memorandum has been signed by the charterer and ship-owner, and the arrangement is put an end to by the act of the ship-owner, the broker not being the cause in any way of its not continuing, the broker in such case is entitled to his commission. But this witness admitted, on cross-examination, that, in order to entitle him, it is necessary that the spirit of the charter should have been actually agreed upon.

Vaughan, Serjt., for the defendant. The plaintiff is not entitled to one farthing from the defendant. He is employed by Lancaster, and may be

entitled to something from him, but not from the defendant.

Lancaster was here re-called, and said, that the employment was as much by the defendant as by him; but that, under no circumstances, did he (Lan-

caster) pay commission.

Vaughan, Serjt. If the matter had been fully settled, the defendant would be liable, but otherwise the *plaintiff is entitled to nothing, for it is upon the work being done that he has a claim to be paid. The paper signed is nothing but a loose memorandum, which ought to have been reduced

into an intelligible and binding document.

PARK, J. Certainly there is some evidence, that, though a ship is not chartered, yet, if the ship-owner be entirely in fault, commission should be paid; but that is not the question here. It would be absurd to give a commission on 15,000l. or 16,000l. for doing almost nothing. It is the broker's duty to draw up the bargain intelligibly; and if he does not, he is entitled to nothing. agree with the law laid down in the case cited; there the contract was clear and intelligible; and the broker was allowed a compensation, he having done all that he was bound to do. But has this broker done all that he was bound to do? Is this an intelligible paper? It is said that another charter party was shown to the defendant, which explains it. This is not the way in which business ought to be done. The terms should be put down intelligibly by the broker, and if they are not, his charge is made for introducing confusion, and leading the parties into law-suits. It is quite clear, that no charter party could have been made out from this paper. If the defendant has received advantage from the acts of the broker, then the verdict should be for the plaintiff, with proportionate compensation; but if the business has been performed in so slovenly a manner, that no advantage has been derived from it, then the verdict must be for the defendant.

Verdict for the defendant.

Pell, Serjt., and Campbell, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies-A. Mitchell, and Reardon & D.]

† Reported also 1 Marsh. Rep. 191; in that case the broker had obtained the voyage he was employed to procure for the ship, and the defence was, that he ought not to be paid his commission, because that voyage would be illegal, unless certain licenses were obtained. This defence, of course, did not avail the party any thing, because the Court considered that the broker had done all that he was employed to do, and was entitled to be paid for his services. See Moneypenny v. Hartland & Others, ante, p. 352.

*SITTINGS AT GUILDHALL, AFTER TRINITY TERM.

BEFORE LORD CHIEF JUSTICE BEST.

GALE v. WELLS.

If a broker makes a contract with the defendant for the purchase or goods, and delivers, by mistake, a bought note to each party, and does not mention his principal's (the buyer's) name, but makes a proper entry of it in his book. Held, that the buyer may maintain an action for the breach of this contract.

Assumpsit to recover damages for the breach of the following contract.

"London, 28th October, 1823.

"Bought of Mr. H. Wells, from 40 and not exceeding 50 tons of Cam-wood, at 12l. per ton in bond, to be paid for at the landing weight, to be brought in the return voyage of the Hetty. Memorandum—The Hetty cleared out for her outward voyage on the 26th instant."

A broker named *Hooper* was called, who proved that he made the contract on the behalf of the plaintiff, and delivered a copy of that produced to the defendant; that he wrote the contract on the defendant's counter, on two half-sheets of paper, and left one with the plaintiff as he went home. On his cross-examination, he-admitted, that he did not mention the name of the plaintiff to the defendant, nor could he positively tell whether the defendant knew that he was a broker, but he stated that very few bargains (if any) of such a description, are made without a broker; and that, from the circumstance of his having left the note, he presumed the defendant must be aware of the capacity in which he acted.

It appeared that the broker delivered bought notes to both plaintiff and defendant, and he could not account for his having done so. The broker's book was produced, in which was an entry of the contract on the day on which it was made; which entry was in the proper form.

A witness proved that he went to the defendant, and showed him the contract, required him to fulfil it, and *tendered him the price of 40 tons at 121. per ton, minus the discount; on which the defendant said, that he knew nothing about it.

The captain of the *Hetty* was called, and proved that he brought home only 19 tons of Cam-wood; that he had stowage for more, and had no doubt he

could have got more by paying a higher price.

A letter, dated the 19th November, 1822, written by the defendant to the Captain, was read. It stated that he left it to the option of the Captain to do as he pleased about the quantity of each article he was to bring, according as he might find it likely to be profitable. It contained also this observation, "I told you I could make a certainty of 10l. a ton for Cam-wood."

Wilde, Serjt., for the defendant. The contract left with my client is that by which he is to be bound, and that is only a contract between *Hooper* and the defendant; and it is not competent to *Hooper*, by delivering a paper to some one else, to introduce a new person, that he himself may be a witness instead of a plaintiff. The contract delivered to the defendant is not as it ought to be, a sold note—"Sold for you to Mr. Gale," but it is "Bought of Mr. H. Wells." This would have been the form of the contract, if the sale were to Hooper personally; and he cannot, under such circumstances, be received here to make out a case by his testimony. There is no contract between the plaintiff and

defendant. There is no demand of commission at the time of making the contract, nor till after the bringing of the action. He cited the case of *Champion v. Plummer*, 1 N. R. 252 and called a person, who proved that the Camwood was sold at 151. per ton; but he admitted, on his cross-examination, that it was damaged by some palm-oil brought over with it; and it appeared, from the evidence of one of the plaintiff's witnesses, that good marketable Camwood sold, at the time when this should have been delivered, for 161. a ton.

*BEST, C. J. It appears to me, that the plaintiff is entitled to 41. per ton, being the difference of price on 40 tons. I am of opinion (but that is rather matter of fact for the Jury) that the delivery of the note intimated that the defendant was dealing with a broker, who must be taken to have been acting for some principal, because a broker cannot, without violating his oath and the law, act in any other capacity. If the defendant doubted whether he was dealing with a broker, he ought to have asked the question. There is no objection, in point of law, to the broker's concealing the principal's name. am also of opinion, that the circumstance of both being bought notes does not vacate the contract. The note is a proper note, it is "Bought of you." But it is said, this is a fraud upon the defendant. The broker is directed by law to keep a book, and make entries day by day. We have the book here, which is free from the error spoken of. The broker swears the entry was made on the day when the transaction took place. The broker swears he made a contract on the 28th of November, which has been clearly broken. The case of Champion v. Plummer decides that, where the contract is with principals, both must sign, and it is said the defendant refused to sign. But such is not the nature of the transaction. The words of the contract show that it was final and binding. The defendant should have returned the paper, if he meant to insist upon its being of no effect, but he does not do so: and the letter to the Captain is consistent with the fact of a bargain having been made. respect to the quantity, my construction of the contract is, that the defendant was bound to get Cam-wood to the extent of 40 or 50 tons, if he could, whatever the price might be, because he takes the chance of that, and the Captain proves that more might have been obtained. I think the defendant must be held to be liable to the extent of 40 tons. And then, with respect to the price, the wood brought over actually sold at 15l. per ton; but it appears that it was *391] injured by palm-oil brought over with *it; and it is in evidence that good marketable Cam-wood sold at the time for 161. I am, therefore, of opinion, that the plaintiff is entitled to recover at the rate of 161., for it is the defendant's duty to show that the damage was not occasioned by his fault.

During the deliberation of the jury, Wilde, Serjt., tendered a bill of excep-

tions, and made the three following points:

1st. That the contract by which the defendant was bound was that delivered to him, which was a contract between him and *Hooper*, and that it was not competent to vary it by introducing *Gale*.

2d. That there was no evidence to be lest to the jury to say whether the

defendant knew that Hooper was acting as a broker. And

3d. That there was no claim in the declaration for these differences of price; for it only stated that the defendant sold certain Cam-wood which he refused to deliver.

Verdict for the plaintiff—Damages, 160%.

Vaughan, Serjt., and Abraham, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies-Brooking, and Smith.]

The case of Champion & Another v. Plummer, 1 N. R. 252, was an action for not delivering a quantity of treacle, bought by the plaintiff of the defendant; the bargain was made by the plaintiff's clerk with the defendant, and a memorandum was made by the

plaintiff's clerk, viz., "Bought of W. Plummer, 20 puncheons of treacle, 37s., to be delivered by 10th of December.

It was objected that this was not a sufficient note or memorandum within the statute of trauds, as it was not signed by the purchaser; and the Court of Common Pleas held that this was not a sufficient memorandum of a contract, as it did not state who were the contracting parties, and would prove a sale to any other person as well as the plaintiffa. The case of Heyman v. Neale, 2 Camp. 337, decides, that where the broker was "agent for both parties, the entry made by the broker in his book, signed by him. 19392 is the binding contract; and is equally binding, whether he sends bought and sold notes to his employers or not; such notes being merely to apprise the parties of the terms of the contract so made. But the case of Wright v. Danah, 2 Camp. 203, decides, that the agent of a party must be a third person, and that one contracting party cannot sign the contract as agent for the other. In Thoraton & Others v. Kempster, 5 Taunt. 786, it was held, that, if a broker, who is agent for both parties, delivers to them notes describing the goods differently, no contract arises. And in Powell v. Divet, 15 East. 29, it was held, that if the broker makes a material alteration in the sale note given to one party, after he has delivered the other sale note to the other, the party who procured his sale note to be so altered, cannot sue on the contract evidenced by it. In Hedges v. Davies, 2 Camp. 530, it was held, that the custom in the city of London, that, if a broker sold goods to be paid by a bill of exchange, the vendor had a right, within a reasonable time, to annul the contract, if not satisfied of the buyer's sufficiency, was reasonable and valid; but that the vendor must intimate his dissert as soon as he has an opportunity effinquiring into the solvency of the purchaser; and five days was considered too long for that purpose.

SEWELL v. CORP.

The certificate of the Veterinary College, that the plaintiff had attended lectures there, is not admissible in evidence, as not coming from a body known to the law. If there is a general usage applicable to a particular trade or profession; persons employing one in such trade or profession will be taken to have dealt with him, according to that usage; but a usage for a veterinary surgeon to charge for his attendances, when there was not much medicine required, is too uncertain.

Assumpsir, by a veterinary surgeon, for attendance and medicines furnished to the defendant's horse.

A certificate of the plaintiff's having attended lectures at the Veterinary College, signed by Mr. *Coleman*, the professor there, and several others, was tendered in evidence on the part of the plaintiff.

BEST, C. J., refused to receive it, on the ground, that it did not come from

any public body known to the law.

Mr. Coleman was called as a witness, and asked by the plaintiff's counsel, whether, to his knowledge, it was the *custom to pay veterinary surgeons for attendance as well as medicines?

Vaughan, Serjt., objected. There can be no custom; this is all modern.
Best, C. J. They do not mean a custom whereof the memory of man runneth not to the contrary; but if there is a general usage applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage. You may cross-examine as to the extent of the usage. With respect to veterinary surgeons, I know of no law that applies to them particularly. If there is no contract, they must go on a quantum meruit. There is a usage for a broker to have commission. If there is a usage here, it is evidence to regulate the claim. I see no objection to the general question as proposed.

Mr. Coleman then stated that the general rule was, to charge for attendance,

when there was not much medicine required.

BEST, C. J. Such an usage as this is too uncertain.

The plaintiff then went on a quantum meruit, and proved several attendances.

Vaughan, Serjt., contended, that by analogy to the case of apothecaries, the jury could not legally give any thing for attendances.

The sum of 11. 12s. 6d. for the medicines furnished, had been paid into

Court.

BEST, C. J., left it to the jury to say, whether that *sum was or was not sufficient for the plaintiff's services and medicines.

Verdict for the plaintiff—Damages, 17s. 6d.

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Pell, Serjt., for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies - Thomson, and Marson.]

See Wood v. Wood, ante, page 59.

BOWEN v. PARRY et al.

In assault, where there is a justification of molliter manus to all the counts in the declaration, the plaintiff cannot be admitted to prove excess, unless he has new assigned: otherwise, where there is a justification pleaded to one count, and the general issue to another: and the words in the plea of molliter manus, "as was lawful for the cause aforesaid," do not allow the plaintiff to recover on the general replication, on the ground of excess in the defendant.

Acron for an assault against three defendants. Pleas—the general issue; and a justification, of "molliter manus;" the plaintiff having misconducted himself in the house of the defendant Parry, and the other defendants being his servants, acting under his authority.

The justification was to all the counts: Replication—De injuria.

The defendant having made out the justification, the plaintiff was proceeding to prove excess.

Vaughan, Serjt., for the defendant, submitted, that this could not be done,

there not being any new assignment.

Pell, Serjt., for the plaintiff, observed, that that was by no means clear. Doubts had been entertained by many in the profession, on account of the words used in the justification: viz.—"As was lawful for the cause aforesaid."
*395]
*Best, C. J. I take the rule to be this: If there are two counts in the declaration, and to one there is a justification, and to the other the general issue, a new assignment is not necessary; but, in this case, the justification applies to every count, therefore I think a new assignment is necessary. I should have no objection to the question being discussed in the Court above; but I do not think that the words quoted let the party in to rely on excess, without a new assignment. I remember, in a case at Chelmsford, I had considerable doubt about this same point, and I then gave my opinion as I do now, and I am strengthened in that opinion, by finding that there was no motion afterwards on the subject.

Verdict for the defendant.

Pell, Serjt., and F. Pollock, for the plaintiff. Vaughan, Serjt., and Wilde, for the defendant.

[Attornies-Gray, and Brough.]

If there have been two assaults, and one be justifiable, and the other not, if a justification is pleaded, the plaintiff should new assign; but if there were two such assaults, and Vol. XII.—30 U 2 there be two counts in the declaration, and to both the general issue is pleaded, and the justification to the first count only, the plaintiff need not new assign, to go into the assault in the second count. Atkinson v. Matteson, 2 T. R. 177. And in Barnes v. Hunt, 11 Ea. 451, where the plaintiff declared for several trespasses committed on several days, and the defendant pleaded a license, the plaintiff replied de injuria; it was held, that the defendant must show a license for each act of trespass proved by the plaintiff, and the plaintiff need not new assign, though the defendant could prove a license for the trespasses committed on some of the days.

*SITTINGS AT WESTMINSTER, AFTER TRINITY TERM. [*396

BEFORE LORD CHIEF JUSTICE BEST.

WICKES v. GOGERLY.

A security given in lieu of a former security, which was tainted by usury, is void; unless in the second security, a deduction is made of all sums paid usuriously, under the former security.

This was an action to recover certain instalments due on an agreement. The defence was usury.

The agreement was dated the 12th of May, 1821. It recited a warrant of attorney, executed by the defendant, and a discharge under the Insolvent Debtor's Act, and a subsequent agreement to pay by instalments a sum of 110.

for principal and interest mentioned in the schedule.

Pell, Serjt., for the defence, called a Mr. Taylor, an attorney, who said, that, early in the year 1818, the defendant was indebted to him in upwards of 100l. which he was desirous of getting paid; and, in consequence, Wickes, the plaintiff, was applied to, and agreed to lend the defendant 100l., for which he was to receive 5l. for three months. Taylor was the defendant's attorney, and an account delivered by him to the defendant was read, in which were two items clearly showing a payment on behalf of defendant to plaintiff in the latter part of 1818, and the beginning of 1819, at the rate of 10l. per cent. per annum. A letter, also in the handwriting of the plaintiff, dated 27th of August, 1820, was put in and read. It mentioned more than 5l. per cent. interest, but required, as a security, a policy of insurance on the life of the defendant: and certain bills of exchange were put in evidence to identify the security sued on, with the original transaction.

The witness Taylor, on his cross-examination, stated, that when the letter of the 27th of August was sent, the transaction was considered an annuity transaction, and a deed had actually been prepared and engrossed by defendant's own son, which, however, defendant refused to *execute. But he could not take upon himself to say, that before the first payment it

was considered an annuity transaction.

Vaughan, Serjt., for the plaintiff. There is no usury made out. This is an imputation not to be cast by conjecture; there must be clear and satisfactory evidence on the subject. The circumstance of the letters requiring a policy on the life, shows that it was an annuity transaction. The plaintiff is not seeking to recover on the original security, but stands on a fresh agreement: and he cited the case of Barnes v. Hedley, 2 Taunt. 184.

Best, C. J. The plaintiff's letter confirms the testimony of Taylor, and there is no doubt the transaction originated in usury. Then comes the question, whether the original usury taints this agreement? To make it do so, it must appear that this is a substituted security for the prior: the recital in the agreement of what took place in 1818, shows this clearly. I quite agree with the doctrine to be found in the case of Barnes v. Hedley; and I wish I could apply it to this case. If this security is a substituted security, and stands for usury, it is void. In this case there is no purging of the transaction, as there was in Barnes v. Hedley.† To bring it within that case, a deduction should have been made from the sum mentioned in the agreement, of such part of it as would refund the sum which was paid for usurious interest. It appears from the bills, to be the same security, and from the evidence of the witness and the plaintiff's letter, it is clear that usurious interest was taken, which has not been deducted. With respect to the draft of the annuity deed, said to have eaged.

Verdict for the defendant.

Vaughan, Serjt., and Chitty, for the plaintiff. Pell, Serjt., for the defendant.

[Attornies—R. Hill, and Davison.]

† The case of Barnes v. Hedley, 2 Taunt. 184, decides that after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is binding.

HASLAM, Administrator of PLAISTOW, v. DIGGLES.

If a bond to secure an annuity, contain a recital of the payment of the consideration, and the annuity has been paid for several years, the actual payment of the consideration will be presumed, though there be no receipt indersed, and though the subscribing witness have no recollection of the subject.

DEBT on a bond for securing the payment of an annuity.

The only disputed point in the case was, the payment of the consideration The bond was executed in 1801.

The execution was proved by the attesting witness, an attorney; who, on being questioned on the part of the plaintiff, as to the payment of the consideration, said, that he had no distinct recollection at such a distance of time, whether it was paid in his presence or not, but he had no doubt of its having been paid. He also stated, in answer to questions put by the defendant's counsel, that, with respect to common bonds, it was not usual to put a receipt for the consideration on the back; but admitted, that he was not very well acquainted with the practice, as to annuity bonds.

The death of the grantee in 1820, and the payment of the annuity for a con-

siderable period, were proved.

The bond recited the payment of the consideration.

Vaughan, Serjt., for the defence, submitted that there ought to be distinct

proof of the actual payment of the money.

Taddy, Serjt., for the plaintiff, contended, that the circumstance of the annuity's having been regularly paid *for so long a period of time, was sufficient evidence that the consideration had been paid. He cited the

eases of *Pool* v. *Cabanes*, 8 T. R. 328, and *Ex parte Maxwell*, 2 East, 85; and argued that the principles laid down by Lord Kenyon, in the latter case, were decisive upon the point in dispute in this; and that much mischief would result to society if it were allowed, at such a distance of time, to rip up such transactions.

BEST, C. J. I have no difficulty in telling the jury, that there is abundant evidence, from which they may presume the payment of the consideration. The attesting witness saying he has no doubt that it was paid, is certainly not evidence; but there is evidence of the payment of the annuity for a considerable time, and it cannot be reasonably supposed, that the anuuity would have been paid for so long a time, if the consideration had not been received. The party, by each succeeding payment, has been giving evidence against himself. It is said, by the counsel for the defendant, that there should have been a receipt for the consideration, indorsed on the bond. But it is not usual to indorse such receipt, except on deeds, and even there it is not necessary, if the deeds recite the payment. There is a recital of such payment in this bond, and the fact of its having taken place is confirmed by the continued payments of the annuity, from the time when it was granted, in 1801, up to nearly the present time. I am therefore of opinion, that the verdict should be for the plaintiff.

*Taddy, Serjt., and Platt, for the plaintiff. Vaughan, Serjt., for the defendant.

[*400

Verdict for the plaintiff.

[Attornies-Drew & Son, and Rogers & Son.]

In the case of *Poole v. Cabanes*, the grantee of an annuity having paid it without objection, during the lifetime of the person who negotiated it for the grantee, the Court would not set the annuity deeds aside, on a representation of facts that could only be answered by such deceased agent. In *Ex parte Maxwell*, the Court would not allow an annuity to be impeached, (on the ground of a supposed defect of consideration,) ten years after it had been granted, and six years after the death of the grantee; and Lord Kenyon observed, that it was a circumstance worthy of notice, that the period fixed by the statute of limitations for claims affecting personal property, had run out, without any attempt to impeach the transaction.

SOAMES, Assignee of BAKER, v. WATTS.

In trover by the assignees of a bankrupt, to recover property in his order and disposition at the time of the act of bankruptcy, no demand and refusal are necessary.

An act of bankruptcy is committed by lying in prison for two months, though the party have the benefit of day rules during that period.

TROVER brought by the assignee of a bankrupt, named Baker, to recover certain property from the defendant, (who claimed it under an execution put in before an act of bankruptcy.) on the authority of the statute, 21 James 1, c. 19. s. 11; the assignee contending that the property in question was property of which the bankrupt was the visible owner at the time of the act of bankruptcy.

The act of bankruptcy consisted of a lying in prison for two months; but it appeared, that once, during that period, the bankrupt was seen at his own

Pell, Serjt., for the defendant, went first for a nonsuit, contending that trover could not be maintained, without a demand and refusal of the property. He

e401] cited Nixon v. Jenkins, 2 H. B. 135,† observing, that there was no edistinction between that case and the present, as the transfer in both cases was lawful at the time; and the very reason why a demand is necessary, is,

because it is notice that keeping the goods is unlawful.

Wilde, Serjt., contra. The statute of 21 James 1st, provides, that goods found in the possession of the bankrupt, as the visible owner, at the time of the act of bankruptcy, shall become the property of the assignees, and be distributed for the benefit of the creditors. The case cited is the case of a contract, which the assignees might either affirm or disaffirm; but here there is nothing to defeat.

F. Pollock, on the same side. The question here is, whether there be any evidence of conversion. I contend, that there is. At this moment persons are carrying on the business, and in possession of the goods.

BEST, C. J. It does not appear that they are the same goods, transferred to

other persons.

Wilde, Serjt., then showed, by the evidence of one of the purchasers, that

the goods were the same goods.

Best, C. J. I am of opinion, that, in this case, no demand and refusal will be necessary. The case cited stands on its own peculiar circumstances. The principle of that case is, that there was a contract, which might be affirmed or disaffirmed. But, I will give you liberty to move on the subject.

Pell, Serjt., then contended, that the act of bankruptcy was not proved, inasmuch as it appeared, that the bankrupt was not within the walls of the prison during the whole of the time, as required by the statute, 21 James 1, c. 19, s. 2.

*BEST, C. J., held, that the act of bankruptcy was complete, notwithstanding the party was seen once at his own shop during the two months, observing, that the principle of the act was, that it is evidence of insolvency, if a man lies two months in prison without being able to get bail; and, that when he is not actually within the walls of the prison, he is either attended by an officer, or on security for the day, and bound to return in the evening.

Wilde, Serjt., mentioned, that Abbott, C. J., had lately decided in a similar

manner in the King's Bench, in the case of Sanderson v. Gray.

Verdict for the plaintiff—Damages, 4501.

Wilde, Serjt., F. Pollock, and Wightman, for the plaintiff. Pell, and Bosanquet, Serjts., and Comyn, for the defendants.

[Attornies-Mayhew, and Wheatstone.]

† In Nixon v. Jenkins, the Court held, that a demand and refusal were necessary to support trever by assignees, for goods sold by the bankrupt collusively, and in contemplation

f his bankennery.

In the case of Stevens v. Jackson & Another, 4 Campbell, 164, where a Sheriff's officer, on the 27th of Angust, 1814, arrested a man who was lying sick in bed, and suffered him to remain at his own house, in the custody of a follower, not named in the warrant, till he was sufficiently recovered, and then removed him to prison, where he remained till the 28th of October; Gibbs, C. J., held, that it was a sufficient lying in prison two months after the arrest; to constitute an act of bankruptcy. The months are lunar months, and the day of the arrest is to be considered as one day of the number; unless the party is subsequently bailed; and then the time is to be reckoned only from his return to custody.

*STAFFORD et al., Assignees of CLARK, Jr., a Bankrupt, v. CLARK, Sen.

If assignees of a bankrupt have brought an action, and have attempted to prove one item of their demand, and fail, because they could not prove an act of bankruptcy sufficiently early, they cannot bring another action for that claim which they could not before succeed in. And the record in the former action is evidence in the second action, without being pleaded, though not conclusive as an estoppel.

An admission by a defendant that he has received 30s. from a bankrupt, after act of bank-

ruptcy, will not support the count on an account stated with the assignees.

This was an action of assumpsit. The declaration consisted of seven counts. The 1st and 2d were for goods sold; the 3d, for money lent; the 4th, for money paid; the 5th, for money had and received to the bankrupt's use; the 6th, on an account stated with the bankrupt; and the 7th, on an account stated with the assignees.

A sum of 51. had been paid into Court on the 1st, 2d, and 5th counts.

The plaintiff's demand was for the amount of two bills of exchange, which the defendant got into his possession after the commission of an act of bankruptcy by the bankrupt, his son, as well as for the sum of 30s., which he received from his son, also after the act of bankruptcy. The case was made out by proof of an admission made by the defendant, to a person who called upon him on behalf of the assignees, that he had received the bills and the 30s. from the bankrupt, after act of bankruptcy.

Vaughan, Serjt., for the defendant, contended, that the 51. paid into Court, applied to the demand of 30s. With respect to the bills of exchange, he set up as a defence, that they had been the subject of an action of trover between the same parties, (see ante, p. 24,) in which action, there was a verdict and judgment for the plaintiffs; and that, therefore, they could not be made the subject of another action; and he offered in evidence the record in the former action of

trover.

*Best, C. J., inquired, whether this should not have been pleaded? Vaughan, Serjt., replied that it was not necessary in assumpsit, but it might be given in evidence under the general issue. He cited the case of Burrows v. Jemino, 2 Strange, 733, from which it appeared, that the opinion he contended for, was sanctioned by the authority of Lord Chief Justice Holt.! He also referred to Kitchen v. Campbell, 2 Sir W. Blackston, 831 : and Bird v. Randall, 3 Burr. 1345.§

*Comyn, who was with Pell, Serjt., for the plaintiffs, cited the case of Vooght v. Winch, 2 B. & A. 662, in which Lord Chief Justice

† This opinion is to be found in the observations of Lord Chancellor King, in giving judgment in Burrows v. Jemino.—He there said, "That he remembered a case which came before him in the Lord Mayor's Court, when he was Recorder of London, where a mariner sued in the Admiralty Court for his wages; and there being a sentence against him there, he afterwards brought his action in the Mayor's Court for the same wages; and his Lordship (as Recorder) being doubtful whether he should allow the defendant to give the sentence in the Admiralty Court in evidence upon non assumpsit, asked the opinion of Chief Justice Holt; who said, that whatever defeated the promise, might be given in evidence on non assumpsit; and that the sentence in the Admiralty Court would be good evidence."

1. Reported also in 3 Wils. Rep. 304.

§ In that case (p. 1353) Lord Massfeld says, that there is an essential difference between cases upon torts, and actions upon the case, which is, "that those are actions strict juris; and, therefore, a former recovery, release, or satisfaction, cannot be given in evidence, but must be pleaded: but an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in Equity, and in effect is so; and therefore such a former recovery, release, or satisfaction, need not be pleaded, but may be given in evidence. For, whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery may in this action be given in evidence by the defendant, because the plaintiff trust recover upon the justice and conscience of his case, and upon that only." (But see the next note.)

If in this case Abbett, C. J., says, "I am aware that in Bird v. Randall, Lord Measfield is reported to have said, that a former recovery need not be pleaded, but will be a

Abbott had distinctly stated his opinion, that a verdict and judgment are not

conclusive evidence, unless pleaded.

BEST, C. J., allowed this evidence to be received; but, on account of the opinion expressed in Vooght v. Winch, gave the plaintiffs' counsel leave to

move the Court above on the subject.

It was admitted, that the bills were included in the declaration in the former action, and that witnesses were examined on the subject of them; but it appeared that they had not been recovered then, on account of an omission to

peared that they had not been recovered then, on account of an omission to prove an act of bankruptcy early enough to overreach the delivery of them by the bankrupt to the defendant; although there were materials for such proof in the briefs, which, in the hurry of the moment, were overlooked by the counsel. *BEST, C. J. I am of opinion that the plaintiff is entitled to 30s. This is an action to recover three sums. With respect to the bills, it is in evidence, that an action of trover was brought for them, and evidence given; and the reason of the assignees' failing to recover was, that the counsel, though they had the means, did not prove an act of bankruptcy sufficiently early. I think the plaintiff cannot recover in a second action what he might have recovered in the first. He had the evidence; and it would be vexing the defendant to suffer a second action to be brought. Whether it happened through the negligence of the attorney or counsel, or of any one else, is immaterial. From the cases mentioned, it appears, that a record need not be pleaded in assumpsit; and it has been settled of late, that whatever goes to show that the plaintiff has no right of action in assumpsit, is evidence under

The verdict was about to be taken as money had and received, on the 5th count, when Vaughan, Serjt., for the defendant, objected, that there was no count for money had and received, to the use of the assignees, which, from the

evidence, this appeared to be.

Pell, Serjt., for the plaintiff, replied, that he went on an account stated, as there was an admission to the agent of the assignees of the fact of the money

having been received.

the general issue.

BEST, C. J., thought the evidence did not make out the account stated, and directed a verdict for 30s. on the 5th count, with liberty to *Pell*, Serjt., to move to increase it by adding the amount of the bills; and to *Vaughan*, Serjt., to move to enter a Nonsuit.

Verdict for the plaintiffs

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*Pell, Serjt., and Comyn, for the plaintiffs.
Vaughan, and Cross, Serjts., for the defendant.

[Attornies-Jones & Bland, and Sarel.]

bar when given in evidence. I cannot, however, accede to that; for the very first thing I learnt in the study of the law was, that a judgment recovered, must be pleaded; that has so strongly engrafted itself on my mind as a general principle, that nothing I have heard in argument this day, has shaken it." And his Lordship's opinion appears to be, that if a former verdict and judgment are given in evidence under the general issue, they are not conclusive, as they would be if pleaded, but go to the jury like other evidence and Mr. Justice Bayley lays down, that a defendant may plead a former verdict for the same cause of action by way of estoppel; but if he pleads the general issue, the jury have to say whether he is guilty or not; and the defendant may prove that the act was not done by him, and that another jury were of opinion that he was not guilty; and for that purpose may give in evidence the judgment in the former cause, for the consideration of the jury. The question, still, being, whether the defendant is guilty or not?

MICHAELMAS TERM.

BEFORE BEST, C. J., PARK, BURROUGH, AND GAZELEE, 18.

In Banc.

Pell, and Vaughan, Serjts., moved, respectively, in pursuance of the leave given at the trial; the one to increase the verdict, by adding the amount of the bills, or to have a new trial, if the Court should be of opinion that the record was not receivable in evidence, under the general issue. And the other, to enter a nonsuit, if the Court should be of opinion that the 5L paid in on the 1st, 2d, and 5th counts, was to be applied to the discharge of the 30s. found to be due on the latter of those counts only. They obtained rules nisi, which came on to be argued together in the course of the term.

Vaughan, Serjt., was heard first, against the increase of the amount of the verdict; and in favor of the nonsuit. He contended, with respect to the bills, that it would lead to infinite mischief and circuity of action, if a plaintiff, having many causes of action, were to unite them in one suit, and offer evidence on all, and failing in some, be still allowed to recover in other suits, for those on which he had failed. "Nemo debet bis vexari," he observed, was the doc-

trine of the Judges in Kitchin v. Campbell.

GAZELEE, J. My difficulty is, that these bills were not left to the conside-

ration of the jury, but were, it seems, expressly excluded.
*Best, C. J. The constant course in such cases, is, to apply to the Court, and get rid of your verdict yourself, and the Court will grant the

application on terms.

Vaughan, Serjt. The same cause of action, is that which the same evidence will support; and when, in a personal action, the same cause of action has been presented to the consideration of the Court, you may use the former verdict as a bar. I admit, that if it is not pleaded, it is not an estoppel, but a question for the jury. This appears from the Duchess of Kingston's case, and the case of Outram v. Morewood, 3 East, 346. If no evidence had been offered, the case might have been different, but here there was an attempt to recover, and it is laid down that, in assumpsit, whatever goes to discharge the cause of action, may be given in evidence under the general issue; as, for example, accord and satisfaction, a release, &c. Brown v. Cornish, 1 Lord Raymond, 217; Co. Lit. 303, a; Ferrer's case, 6 Rep. 7.

Cross, Serjt., followed on the same side. He cited Moses v. Macfarlan, 2 Burr. 1006. He also contended that Vooght v. Winch was strained further than its true meaning warranted. He further argued, that the record in this case was admissible, by analogy to that class of cases in which it had been holden, that a foreign judgment may be given in evidence in an action against an underwriter, without its being pleaded. Geyer v. Aquilar, 7 Ter. Rep. 681;

Bolton v. Gladstone, 5 East, 155.

Pell, Serjt., against the nonsuit, argued, first, that the verdict for the 30s. should have been taken on the 7th count, which was an account stated with the assignees. The merest admission on an account stated is enough; an admission of one item only.

The defendant told the witness he had *received the [*409 BEST, C. J.

money. Is that an account stated with the assignees?

Pell, Serjt. In law it is; because the witness applies on behalf of the assignees: and he cited Knowles v. Mitchell, 13 East, 249; and Highmore v. Primrose, 5 M. & S. 65, to show the nature of the evidence which would support an account stated.

PARK, J. My difficulty is this: Here is a rule of Court, by which the defendant says, I pay you 51. on certain counts; and shall you, by giving the rule in evidence, draw the defendant into an admission, on a count, which he has negatived by the payment of the money?

Best, C. J. If I say "I owe you 30s.," that is an account stated; but not

if I say "I have received" that sum.

Pell, Serjt. Here is evidence of an existing debt, and that is evidence on an account stated. The saying, or what amounts in substance to saying, "I owe you," or "I have for you," is sufficient.

On BEST, C. J., stating decisively, that the verdict was taken on the 5th count, that being the only count for money had and received, the Court were of opinion that it was conclusive, and stopped the further discussion of the

With respect to the second point, Pell, Serjt., contended, that a record should be pleaded, to give the other party a replication, and not put in on the general issue, so as to call upon him to meet it in the hurry of Nisi Prius; and he cited Seddon v. Tutop, 6 Ter. Rep. 607. He contended, further, that the opinion of Abbott, C. J., in Vooght v. Winch, must be taken in a general and *410] unrestricted sense, *and that foreign sentences ranged themselves under a different principle, and therefore were not in point.

PARK, J. If you put a record upon the table and say, "Here is a record, this is conclusive," that alone will not do; but you must show the relevancy of it, unless that be admitted. This will, I believe, go to reconcile most of the

cases.

Pell, Serjt. Abbott, C. J., in Veoght v. Winch, mentions Bird v. Randall,

and yet his judgment is pointedly against it.

PARK, J. In this case, I am of opinion, that judgment of nonsuit must be entered. We think ourselves bound by the note of the Chief Justice, that the verdict was taken on the 5th count, for money had and received; and not on the 7th count, on an account stated with the assignees. But even if we were not, it would make no difference, for I think the account stated is not supported by the evidence. It is one thing to say "I owe," and another to say "I have received." I think also, that when a defendant has paid in money on specific counts, it is not competent to the party who has taken it out, afterwards to say, that it applied to other counts than those on which he received it. As to the other question, I think, on the ground taken at the trial, that a nonsuit ought to be entered. I have no doubt that a record is admissible in evidence in some cases, without being pleaded; for the authorities are, that if a party puts it in as an absolute bar, then he must plead it, but if not, he may give it in evidence. Chief Justice De Grey, and Lord Mansfield, lay down this distinction: If in this way a record is put in, it is not to introduce the trial per recordum, to try its validity, as when it is pleaded, but only as a circumstance to show that there has been a former decision on the subject.

*Burrough, J. The record was admissible in evidence; because, without it, the defendant could not have gone into what took place at the former trial. I give my judgment for the defendant, because I think a man cannot be allowed to split his cause of action into two parts. The plaintiffs, at the first trial, did not produce the requisite evidence; that was their own fault, and they must not be allowed to harass the defendant by a second trial.

GAZELEE, J. There are different authorities as to what would be the effect of the record if given in evidence. I have not been able to find any one authority to say, it may not be given in evidence on the general issue. On the contrary, as early as the time of Salkeld, a distinction appears to have been taken. From the subsequent part of the case of Vooght v. Winch, it appears that the opinion of Abbott, C. J., has not so broad a signification as has been attempted to be put upon it. All that is meant is, that a party must plead a record, if he means to make it conclusive. What the effect would be, of paying money into court, I do not say, the verdict having been taken on the 5th count.

Bret, C. J. I entirely agree with my learned Brothers. There were three Vol. XII.—31

points made at Nisi Prius. 1st, Whether the bills in question having been made the subject of a former action, and evidence having been given respecting them, the plaintiff could recover them in the present suit. I had no doubt, at Nisi Prius, that he could not. I am still of the same opinion, and am borne out in it by authorities. The cases of Hall v. Stone, 1 Strange, 515, and Markham v. Middleton, 2 Strange, 1259, show, that by an application to the Court, a remedy might be had on payment of costs. There is a distinction-The law is, that if a party offers no evidence on a particular part of his claim, then a new action may be brought for such part; but if he does offer evidence, and fails, he is *prevented from bringing a fresh action, because it would be harassing the defendant. With respect to the giving in evidence the record on the general issue, I at first thought that it could not be done; but, on my Brother Vaughan mentioning the cases of Bird v. Randall, and Burrows v. Jemino, my opinion was altered. I am now clear, that it was competent to give it in evidence without its being pleaded. As to the last point, I am of opinion that the verdict was rightly taken on the 5th count. There was nothing in the evidence to support an account stated. The cases cited on the subject prove, that an admission of a balance is evidence on an account stated; but in this case there was nothing more than the admission of an item.

Judgment of nonsuit

HARRISON v. HARRISON.

In assessing damages on a writ of enquiry, on a bond to replace stock, the fair rule is to take the price of the stock on the day of the trial, or the day previous.

This was a writ of enquiry, executed before the Lord Chief Justice, to assess damages on a bond to replace stock.

The question was, as to the day on which the price of the stock should be

taken, in order to calculate the amount of damages.

Wilde, Serjt., for the plaintiff, contended, that the price should be taken on the day before the execution of the writ of enquiry. He argued, that the object of the bond's being given was, to ensure to the plaintiff the same quantity of stock; and, in order to do this, it was necessary, the defendant not having purchased it at the day mentioned in the bond, that the plaintiff should recover as *much money from him as would secure the purchase of the stock at the time of such recovery. He contended, that there was a distinction between the cases of stock and goods; and he cited Shepherd v. Johnson 2 East, 211;† MArthur v. Lord Seaforth, 2 Taunt. 257.

Lawes, Serjt., for the defendant. This is an action on a contract to be performed on a particular day. It becomes a debt from the time of its ceasing to be performed. A claim is made for collateral damages: to this there are two answers. The 1st is, that the parties have not stipulated for it in the contract. The 2d is, that all the damage stated on the record is the not transferring the stock on the particular day. There is no allegation of any loss from a subsequent rise of the stocks. It is a naked dry breach. Non constat, that if the stock had been transferred on a particular day, that the plaintiff would

[†] In this case, the stock had risen, at the time of the trial, above the price which it had borne on the day on which it was agreed to have been replaced; and the Court held, that the plaintiff was entitled to the price it bore at the time of the trial: but in M'Arthur v. Lord Seaforth, the Court would not allow the plaintiff to recover an advantage that he might have made of his stock, if he had had it between the day on which it ought to have been replaced and the trial; as from the evidence it appeared, the plaintiff would not have made the advantage if he had had the stock.

have continued it there; and he cited Isherwood v. Seddon, mentioned in 2 East, 212.†

BEST, C. J. I think the fair rule is, to take the damages at the price of yesterday or to-day. When you had the money, you promised to restore the stock. Justice is not done, if you do not place the plaintiff in the same situation in which he would have been if the stock had been *replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is,—you have effectually prevented him from doing so.

Verdict for plaintiff, with damages according to the price of the day

preceding the execution of the writ of enquiry.

Wilde, Serjt., and Wightman, for the plaintiff.

Laures, Serjt., for the defendant.

[Attornies-Makinson, and Yatman.]

† This case is mentioned in 2 East, as having been decided by Lord Kenyen; but the dectrine of it does not appear to have been adopted by the Court in the case of Sheppard v. Jehnen, in which it was cited.

BREMNER v. WILLIAMS.

Every stage-coach proprietor impliedly undertakes that his coach shall be sufficiently secure to perform the journeys it undertakes; and he ought to examine its sufficiency previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietor for negligence, though the coach had been examined previous to the second journey before the accident; and though it had been repaired at the coach-maker's only three or four days before.

Assumer against the defendant, who was proprietor of a Kentish-Town stage, to recover a compensation for an injury sustained by the plaintiff, in consequence of the insufficient state of the defendant's coach.

It was proved, on the part of the plaintiff, that he, and his two sons, got into the dickey of the coach in question, for the purpose of being taken to Kentish-Town. When the coach was in Gray's Inn Lane, the plaintiff felt a moving of the dickey, and called to the driver, and told him of it, and asked him if it was loose? The driver replied, that the motion was produced by the bending of the springs merely, and then drove on; and, soon after, the dickey came off, and the plaintiff fell.

On the part of the defendant, the driver was called; who stated, that the coach had come from the *coachmaker's, where it had been under repair only three or four days before the accident; that it was not a very old coach; and that he washed it, and his master examined it, on the very morning on which the accident happened. On his cross-examination, he admitted, that at the time the plaintiff went, the coach was on its second journey, and that no examination had taken place immediately previous to that journey.

The coach-maker also proved that the coach was sent to him, with directions to do the needful; which he did; and when he sent it out, he had every reason to believe it safe. He stated also, that the condition of that part which broke and to which the dickey was attached, could not be discovered by external examination only. But, on his cross-examination, he admitted, that imbreaking might have been produced by previous overloadings.

Vaughan, Serjt., for the defendant. This action is founded in negligence:

and it should be shown that the defendant, or his servants, were undoubtedly to blame. The proprietor is only responsible if there is not ordinary and reasonable care. If the coach came out of the coach-maker's defective, and the defect could not be discovered by external inspection, the defendant

certainly cannot be liable.

Pell, Serjt., for the plaintiff, in reply. The driver should have stopped and investigated the plaintiff's complaint when it was made to him in Gray's has Lane. The action is not, as has been said, founded in negligence. The record is, that the defendant undertook securely to carry the plaintiff to the end of his journey. It was a part of the substance of the coach which gave way. The proprietor is bound to provide for every journey a coach fit and competent for

the performance of that journey.

BEST, C. J. The declaration states, that the defendant undertook to carry the plaintiff safely. There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach-proprietor warrants to the public that his stage-coach is equal to the journey it undertakes. The counts go on to charge negligence, and the case may be decided upon that ground also. The plaintiff, it seems, complained in Gray's Inn Lane; and if the driver had then got down, most likely the accident would not have happened. It is for the jury to say, whether, when a man's attention is called to a particular motion of the dickey of his coach, and he does not get down to examine the cause, is not this a negligence. The driver said, it was the playing of the springs; but it could not be so, for the plaintiff would have found that before. I am of opinion, that it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey. For, when ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey.

Verdict for the plaintiff—Damages 51l. Pell, and Wilde, Serjts., and Comyn, for the plaintiff.

Vaughan, Serjt., and Curwood, for the defendant.

[Attornies-J. of T. Davies, and Eicke.]

*BALL v. TAYLOR.

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A witness to prove the execution of a bond, did not recollect whether, at the time it was executed, it had any seal; and he swore that he did not read the attestation at the time he witnessed the execution: but there being a seal at the time of the trial, and the bond itself saying, "sealed with our seals:" it was held to be sufficient proof; but this evidence would not have been sufficient, if there had been no seal on the bend at the time of the trial.

Action on a bond. Plea—Non est factum. The witness who was called to prove the execution of the bond said, on his cross-examination, that he did not recollect whether there was any wafer or seal to the instrument at the time the defendant signed it: and that the defendant read it over, but he could not say whether he delivered it or not.

The bond, on inspection by the Court, appeared to have a seal, and the attestation was in the usual form, "signed, sealed, and delivered;" but the

witness said he did not read over the attestation before he signed it.

Vaughan, Serjt., under these circumstances, submitted that the execution

was not proved.

BEST, C. J. I shall tell the jury that there is evidence of all that is right having been done. If a man puts down a bond on a table for another to take it up, that is a delivery. If, on inspection, no seal had been found affixed, then I should have held that it would not do. The words of the bond are, "sealed with our seals," and on inspection we find seals. If sealing and delivery are not presumed, and it is made to rest upon the fallible memory of a witness at a distance of time, as to whether all the requisites were performed at the time, great danger would result to bonds, and, perhaps, to other instruments on which the welfare of families depends.

Onslow, Serjt., as Amicus Curiæ, mentioned, that he was once engaged in a case, in which the present Lord Chancellor held, that similar evidence to that now produced was sufficient to raise the presumption that every *thing necessary was done; and that, to rebut such presumption, the contrary

must be distinctly proved.

The Lord Chief Justice directed a verdict for the plaintiff.

Wilde, Serjt., and F. Pollock, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—Knight & Fyson, and Mann.]

v 2

CASES

AT

NISI PRIUS,

AT THE

SITTINGS IN MICHAELMAS TERM.

COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, MICHAELMAS TERM, 1824.

BEFORE LORD CHIEF JUSTICE ABBOTT.

GRIFFITH v. HODGES.

If s person tender money, but will not pay it unless the person to whom it is tendered will give him a receipt in full of all demands, such a tender is bad.

If the landlord of lodgings enter into, or use, the lodgings, while his tenant is in possession of them, it deprives the landlord of his right to rent; but the tenant has, during the tenancy, abandoned the possession, and the landlord lights fires in the rooms, and even makes some use of such fires, he will not by this lose his right to rent.

Assumpsit for use and occupation. Pleas-General issue, and a tender of Replication—a subsequent demand of the seven guineas, and seven guineas. a refusal by the defendant to pay that sum.

It appeared, that, at Midsummer, 1823, the defendant took the first floor and kitchen in the plaintiff's house, at forty guineas a-year; but that, after staying a few days, *the defendant went away, and left the apartments unoccupied; and that in February, 1824, a quarter's rent was demanded of him, when he offered seven guineas, which the plaintiff then declined accepting: but on a subsequent day, the plaintiff's attorney applied for the seven guiness, which the defendant refused to pay without a receipt in full of all demands, which the plaintiff's attorney would not give; but he offered a receipt for the money, which he had ready written, but this the defendant would not accept

The defence was, that about a fortnight after the defendant left the apartments, and long before the quarter had expired, or any rent had become due,

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the plaintiff had resumed the possession of the apartments, and so waived his claim to rent. But the only evidence that the plaintiff had resumed the possession was, that a fortnight after the defendant quitted the apartments, the plaintiff had a fire lighted in the kitchen, at which he caused a hare to be roasted.

ABBOTT, C. J. No man can insist on a receipt in full of all demands; and if a man makes a tender of money, insisting at the same time on a receipt in full of all demands, I have no doubt that such a tender is bad: therefore, on that part of the case the plaintiff is entitled to a verdict. On the other point: If a landlord, while his tenant is in the possession and use of apartments, enters and uses such premises, or any part of them, that will deprive him of his claim to rent. But here the tenant had left the apartments vacant; and as it was proper that fires should be lighted in them, I don't think that the plaintiff, by lighting such a fire, or even making some use of it when he had lighted it, is a sufficient taking possession of the premises to deprive him of his right to rent.

Verdict for the plaintiff.

*Scarlett, and Andrews, for the plaintiff.

Marryatt, and Holt, for the defendant.

[Attornies-Allen & Co., and Loxley.]

ARGUMENT BEFORE THE TWELVE JUDGES.

PRESENT, ABBOTT, C. J., BEST, C. J., ALEXANDER, C. B., GRAHAM, B., BAYLEY, J., PARK, J., HOLROYD, J., BURROUGH, J., GARROW, B., HUL-LOCK, B., LITTLEDALE, J., AND GASELEE, J.

REX v. HENRY FAUNTLEROY.

A power of attorney under seal to transfer stock in the public funds is a deed: and the uttering of such a power of attorney, knowing it to be forged, is an uttering of a forged deed within the statute 2 Geo. 2, c. 25, s. 1, and is a capital offence under that statute.

THE prisoner, who was a partner in the banking-house of Marsh & Co., in Berners-street, had been charged with forging, in the city of London, a letter of attorney to transfer stock; and was tried before Park, J., and Garrow, B., at the last October Sessions at the Old Bailey.

The indictment on which he was tried contained eleven counts: the first count charged him with forging "a certain deed;" and in it was set out a forged power of attorney, purporting to be executed by Frances Young, and empowering the prisoner to sell out her stock in the 3 per cent. Consols. The 2d count charged him with uttering "a certain false, forged, and counterfeited deed, knowing it to be forged;" and set out the same forged power of attorney. The 3d count was for "disposing of and putting away a certain false, forged, and counterfeited deed;" and set out the same forged power of attorney. In these counts the offence was charged to have been committed with intent to defraud the Governor and Company of the Bank of England. The 4th count was similar to the 1st; the 5th count similar to the 2d; and the 6th similar to

the 3d, except that they laid the offence, with intent *to defraud Frances Young. The 7th was also similar to the 1st; the 8th similar to the 2d; and the 9th similar to the 3d, except that in these the offence was laid with intent to defraud Charles Flower (the person to whom the prisoner had sold the stock under the power of attorney). The 10th count was for forging a letter of attorney to transfer the share of Frances Young in the capital stock of certain annuities, called Consolidated three pounds per cent. Annuities, established by an act of 25 Geo. 2, (the title of which was set out,) and by divers subsequent acts of Parliament; and stated, that the proprietors of such annuities had transferable shares in such capital stock; in this count the power of attorney was set out. The 11th count was similar to the 10th, except that instead of saying that the stock was established by an act of 25 Geo. 2, and by divers other acts of Parliament, it set forth the titles of all acts relating in any way to the stock, (in number 49.)

The power of attorney, set out in every count of the indictment, was in the

following words:-

"Know all men by these presents, that I, Frances Young, of Chickester, spinster, do make, constitute, and appoint William Marsh, Sir James Sibbald, Baronet, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham, all of Berners-street, bankers, my true and lawful attornies, jointly, and each of them separately, for me, and in my name, and on my behalf, to accept all such transfers as are, or may hereafter be made unto me of any interest or share in the capital or joint stock of 3 per cent. Annuities, created by an act of Parliament of the twenty-fifth year of the reign of his Majesty King George II., entitled, an act for converting the several annuities therein mentioned, into several joint stocks of annuities, transferable at the Bank of England, to be charged on the Sinking Fund, &c., and by several subsequent acts. Also, to receive and give receipts for all dividends due and payable for the same for the time being. *Likewise, to sell, assign, and transfer, all or any part of five thousand pounds, being part of my said stock or annuities; to receive the consideration-money, and give a receipt or receipts for the same; and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that my said attornies, or either of them, shall do therein, by virtue hereof. And, in case of my death, this letter of attorney, as to all matters and things which after my decease shall be done by my said attornies, or either of them, by virtue of, or under color or in pursuance thereof, shall, so far as the Governor and Company of the Bank of England are interested or concerned, be as binding on my executors and administrators, as the same would have been upon me if living, unless notice in writing of my death shall have been previously given to the said Governor and Company by my executors or administrators, or by some person or persons interested in the property to which this letter of attorney refers. And, unless such notice be given, I hereby promise and engage, and bind myself, my executors, or administrators, to and with the said Governor and Company of the Bank of England, that they, my said executors or administrators, shall and do allow, ratify, and confirm, as good, valid, and effectual, against them, and against my estate, whatsoever shall or may be done by my said attornies, or either of them, after my decease, so far as the said Governor and Company of the Bank of England shall or may be, in any way or manner, interested therein. In witness whereof I have hereunto set my hand and seal. the thirty-first day of May, in the year of our Lord one thousand eight hundred and fifteen.

Signed, scaled, and delivered in the presence of

John Watson

John Watson, James Tyson, Clerks to Marsh, Sibbald & Co. Bankers, Berners-street.

"Frances Young." [L. S.]

The prisoner was found guilty on the 2d, 5th, and 8th counts; that se, for

outering a forged deed with intent to odefraud the Bank, Frances Young, and Charles Flower, respectively.

In arrest of judgment, Alley, Brodrick, and C. Phillips, contended, that the Court could not give a judgment affecting the prisoner's life on this conviction; because the uttering of such a forged power of attorney, as was stated on the face of this record, was not a capital offence; a power of attorney to transfer stock not being a deed within the meaning of the statute 2 Geo. 2, c. 25, s. 1. But, after they had been heard in favor of this objection, and Bosanquet, Serjt., and Law, contra, Garrow, B., and the Recorder were of opinion, that the objection was not good, and overruled it; and the prisoner was condemned to be hanged. But, subsequently, the prisoner petitioned the Crown, on the ground that the objection taken by his counsel, had been improperly overruled. The case was argued before the Twelve Judges, by Brodrick for the prisoner, and

Bosanquet, Serjt., for the Crown.

Brodrick. The question is, whether the uttering of this power of attorney is the uttering of a forged deed, within the meaning of the statute 2 Geo. 2, c. 25, s. 1. It was most truly stated, on the motion in arrest of judgment at the Old Bailey, that, a few years since, a person named Wait was tried and convicted on counts similarly framed to those on which the present prisoner was convicted: his case too came under their Lordships' consideration (7 Moore, 473;) but it was on a question raised as to the competency of a witness. And in that case the present question was not raised by the prisoner's counsel, as it would have weakened the arguments he used on the objection taken in that case. In the case of Lyon, 2 Russ. 1602, the principal point was, whether the forgery of a power of attorney to receive seamen's prize-money, which was not in the form prescribed by the statute 45 Geo. 3, c. 72, s. 92, was a capital offence. It is clear, that no express enactment makes uttering a forged power of attorney a *specific offence; and the question will be, whether it falls within the 2 Geo. 2, as uttering a deed. My first proposition is, that this power of attorney is not, by correct legal description, a deed; though I admit there are words of covenant contained in it. And if I should fail in this, I shall show, that it is not such a deed as was intended by the Legislature to be included in the 2 Geo. 2; and, if it was not so intended, it will not be so construed, though it may be within the words. As to the first point. From the earliest times, deeds and powers of attorney have been considered as different. In Com. Dig. Title Fait, a deed is defined to be a contract, signed, sealed, and delivered; and it cites Co. L. 35 b.: and in that book, p. 171 b., it is described to be an instrument comprehending writing, sealing, delivery, and matter of contract. This definition or description, as to contracts, may be rather too narrow, as it may be extended to grants. However, Spelman, Ducange, Cowell, and Wood, Ins., all speak of a contract as essential to the definition of a deed. Now, a letter of attorney is a mere authority to act, and no interest passes; it is revocable by matter in pais, and does not require to be revoked by matter of equally high nature; indeed, in the case of The King v. Wait, (7 Moore, 473,) Mr. Serjt. Bosanquet himself contended, that powers of attorney were revocable by matter in pais, and cited 2 Roll's Abr. 8, pl. 5 & 10; and the learned Serjt. said, that the party himself afterwards acting, was a sufficient revocation of the power of attorney; and that in practice they were never revoked by deed. Deeds were called by the ancient writers facta and chartæ; bond powers of attorney were called literæ. In Maddox's Formulare Anglicanum, p. 448, there is the oldest power of attorney known; it was to deliver seisin, and was under seal; it is called litera, and the feofiment is called charta. There is another in the same work (p. 449,) of the date of 1235, and indeed many more.

GRAHAM, B. Littleton lays down, that authority to deliver seisin must be per fait.

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*Brodrick. In some books, powers of attorney may be loosely called fails, but never facta or chartæ. In Fleta, b. 1, c. 22, p. 32, Crimen falsi is laid down to be chartis aut literis, making a clear distinction between the charta and the litera. Powers of attorney are not the only instruments sealed and delivered, which are not deeds; awards are often signed, sealed, and delivered; Dodd v. Herbert, Sty. 459.

BAYLEY, J. But the authorities say, that they are only delivered as awards. Brodrick. A case in the Year Book, 85 Hen. 5, c. 37, shows, that a letter of attorney was not considered as a deed. The covenant to indemnify the Bank against all acts of the attorney in pursuance of the power, after the death of the party, carries the case no further; for just such covenants are in the forms I have cited from Maddox's Formulare; and yet they are still termed literæ, and not fucta. The legal effect of the words used in an instrument is to be considered: now, though the words used, are words of contract, yet they do not amount to, nor can they operate in law as a covenant, inasmuch as they confer no right of action beyond that which is given by the preceding words in the instrument, of which they are, in substance, a repetition; a contract by A. never to sue B., is a release, and must be pleaded as such. If I have made out that a power of attorney is not a deed, this conviction cannot be supported; but if I have only succeeded in making it doubtful, great weight is thereby added to the second point, that the Legislature did not mean to include powers of attorney in the term deeds. The fact of there being some statutes relating to deeds, and others to powers of attorney, affords a strong argument, that the Legislature considered them as distinct objects of penal legislation. It is not the mere words, but the intent of Parliament that must be *considered.†

Penal statutes must be construed strictly; and I need not notice the doubt on the Statute of Edw. 6th, for stealing horses, whether a person could be convicted of stealing a single horse. And Lord Kenyon lays down (4 Ter. Rep. 665) that a penal statute cannot be extended to cases not intended by the Legislature, though within the mischief intended to be remedied. And another strong authority, and more express, is in 2 Inst. 386. This was cited by my Lord Chief Justice, in Doe d. Nethercote v. Bartle, 5 B. & A. 501; and it is there laid down, "That a case out of the mischief intended to be remedied by a statute, shall be construed to be out of the purview, though it be within the words." It will, therefore, be my object to show, that the Legislature, under the term "deed," did not intend to include powers of attorney. The way to expound an act of Parliament, is by a reference to the preamble, and the reason of making the act. Com. Dig. (tit. Parliament,) and Plowd. 363. The statute 8 Geo. 1, c. 22, was the first act, which made it a capital offence to forge a power of attorney to transfer stock. That statute not only makes it capital to forge, or procure such power to be forged, but also to knowingly demand, or endeavor to have such stock transferred, or to falsely personate, &c. This statute, on which the last two counts are framed, evidently meant to provide for offences of this kind. The statute 2 Geo. 2, c. 25, on which the conviction took place, recites, that it was necessary to extend a more exemplary punishment to forgeries; and it makes forging a deed a capital felony: the letters of attorney were included in the former statute. It will not be denied, that all bank powers were, before the 8 Geo. 1, in the same form as now: and it is clear, collecting the intention of the Legislature from their words, that they did not, in the statute 2 Geo. 2, mean to include powers of attorney; but clearly meant other deeds, if these be deeds at all; for, before that act, it was not a capital offence to forge a *deed, though it was so to forge a letter of attorney to transfer stock. In the statute 31 Geo. 2, c. 22, s. 77, the provisions of 8 Geo. 1, as to powers of attorney, are re-enacted, only extending it to corporations who might be injured; and, in s. 78 of the same act, the

[†] See the judgment of Bayley, J. in Osmond v. Middlecombe, 2 B. & A. 50.

2 Geo. 2, as to deeds, is re-enacted, with a little extension in regard to corporations; and this proves to demonstration, that the Legislature considered them to be different instruments. The 37 Geo. 3, c. 122, makes it an offence to forge the witnesses' names to a power of attorney, but does not extend to deeds; and a number of other acts of Parliament make it penal to utter forged powers of attorney to receive seamen's wages (9 Geo. 3, c. 30, s. 6) of out-pensioners from Greenwich Hospital, &c.; but none of these mention deeds; and if uttering them was capital under the 2 Geo. 2, as for uttering forged deeds, these enactments would all be unnecessary. I must therefore contend, that if a power of attorney is a deed, it is not so within the meaning of the statute 2 Geo. 2; and that, therefore, the uttering it, knowing it to be forged, is not a capital offence.

Bosanquet, Serjt., for the Crown. On the question, whether a power of attorney is a deed, many definitions from learned authors have been quoted, particularly Lord Coke. This shows how dangerous it is to take definitions even from high authorities; for though it is contended that nothing is a deed which has not a contract in it, those very learned authors, and many others, lay down that a letter of attorney to deliver seisin, and to receive seisin, must be by deed; releases, confirmations, and disclaimers, are all by deed, and yet they are neither of them matters of contract. The argument on the other side is, that there are two sorts of sealed instruments, one sort called charte, the other literse. In Co. Lit. 52 a., it is laid down, that the authority to deliver seisin must be by deed; a letter of attorney to execute a deed must also be so; as must a letter of attorney to convey any matter lying in grant: and Lord Coke continues—"for literæ *does sometimes signify a deed, as '429] Lord Come conditions of the liter acquietancie;" and he cites Britton, 101 b.,: and I therefore contend, that a written instrument, signed, sealed, and delivered, is a deed. Goddard's case, 2 Rep. 5, it is laid down, that a deed is a writing on parchment, signed, sealed, and delivered; and 2 Roll. Abr. 21, goes to the same point. In another case, in Dyer, the question was, whether forging a customary, sealed by the copyholders of a manor, was within the statute of Elizabeth. The court thought that it was; but the word deed is not mentioned. It is said, that an award signed and sealed is not a deed: and in the case of Brown v. Vawser, 4 East, 584, the question was, whether an award under a seal must have a deed stamp; and Lord Ellenborough said, that it need not; as the arbitrator was functus officii when he had made his award, and had it ready to be delivered; and that, prior to actual delivery, the award was complete: but LAWRENCE, J., says, that if the arbitrator delivered his award, under seal, as a deed, it must then have a deed stamp; but that if it were not delivered as a deed, though it were by writing, under seal, the common award stamp would be sufficient. There are numberless acts done by deeds which contain nothing of contract: a license may be by deed; on a fine without a deed to lead the uses, the uses would result to the party himself, and yet he may, by deed, declare the uses to himself for life, to his wife for life, to his first and other sons in tail, &c.; and yet in all this there is nothing of contract. It has been said, that the covenant contained in this power of attorney is nugatory; but it was introduced on very great advice; and it is clear that no man can appoint another to be attorney to his executors, and much less to his administrators, therefore the death of the party would put an end to the power; and the covenant is, therefore, necessary to secure the Bank as to acts done by the attorney after the death of the party, and before they are apprised of it. case of a covenant never to sue being pleaded as a release, has been pushed too far; for, though *it may be pleaded as a release, yet there is no law which holds that it may not also be used as a covenant. But the press of the argument is, that, though this may be a deed, it is not a deed within the meaning of the stat. 2 Geo. 2: the words of that statute extend to the forging and the uttering of "any deed." The case is, therefore, within the terms of

that act, which has been repeatedly applied to cases of the utterers of forged powers of attorney; and, indeed, the statute 8 Geo. 1, does not apply to the public funds.

ABBOTT, C. J. Does that statute include the forgery of powers of attorney

to transfer stock in the public funds?

Bosanquet, Serjt. That would depend on the construction of the words "capital stocks," which only apply to the capitals of joint-stock companies, but not to the public funds, which are not capital stocks, but annuities: and the statute 31 Geo. 2, c. 22, s. 77, which extends the statute 8 Geo. 1, does not go any further in this respect. It has been always laid down, that affirmatory words in an act of Parliament do not repeal a former act, if both can have effect together. Therefore the last act would not affect a former act making it capital to forge or utter a deed. The preamble of the statute 2 Geo. 2, goes to show that the Legislature intended to enhance the punishment of forgery. and in fact they did so; for almost all prosecutions for forgery are now carried on under that statute, except in cases for the forgery of bank-notes. The statute 37 Geo. 3, c. 122, only regards genuine powers of attorney, the names of the witnesses only being forged; and it should be observed, that the Bank powers are not of necessity by deed; they need only be under the hand and seal of the party; and there are many corporations whose stock may be transferred with even less formality than is required at the Bank. And here I must refer to the *very long practice; for there have been cases in which many prisoners have been tried and convicted [*43] of forging and uttering powers of attorney such as this is, as for forging or uttering deeds; and yet, neither the learned Judges who watched over the fate of those prisoners, nor the able counsel who defended them, ever took any objection of this kind. In 1796, there were two indictments against Henry Weston, for forging and uttering a deed, (a power of attorney like the present,) and there was a count for forging a power of attorney; he was convicted and executed; but in that case there was evidence of the actual forgery. In 1802, on an indictment similarly framed, a person named Cock was tried. That person was defended by the late Sir V. Gibbs, and there was no evidence of the actual forgery; and he was convicted and executed. The cases of Anne Hurle, in 1804, and Mary Anne James, in 1817, were precisely similar. They were convicted of uttering a deed, which was, in fact, such a power of attorney as the present. In the case of Joseph Boyce, in 1816, there was a count for forging a power of attorney, and there was evidence of the actual forgery. In the case of John Wait, there was no count for forging, but only for uttering; and, notwithstanding the great exertions made in that case, this objection was never taken: and though not taken by Counsel, if it had been a good objection, it would have occurred to some of the learned Judges. The case of Rex v. Lyon has been adverted to: he was indicted for forging and uttering a power of attorney to receive seamen's wages; and a statute, 45 Geo. 3, c. 72, s. 92, had prescribed a particular form for powers of that kind; and the question then was, whether, the forged one not being in the prescribed form, it was a capital offence to forge it; and all the Judges, except one, considered that it was a deed within the statute 2 Geo. 2.

BAYLEY, J. I was one of the Judges who was present on that occasion. All the twelve Judges, with the *exception of my Brother Graham, [*432 who doubted, thought it was a capital offence, though the form of the power was not according to the act of 45 Geo. 3: and ten of the Judges thought. that, since that act, it was a deed; my Brother Graham and myself being of a different opinion.

Bosanquet, Serit. I have understood that ten of the Judges thought the conviction good under the statute 2 Geo. 2.

GRAHAM, B. I think that it was so.

PARK, J. In 1787, Sophia Pringle was convicted before Gould, J., and Themson, B., of uttering a deed, which was a power of attorney.

Bosanquet, Serit. On these grounds I submit that the present conviction is

Broderick, in reply. It has been contended, that the true definition of a deed is, a writing signed, sealed, and delivered; and some loose dicta are brought forward to support this proposition, in answer to the high authorities I have quoted: and if this were the true definition, a notice to quit, or a will, would be deeds, if signed, sealed, and delivered, which clearly would not be so. There must be, in addition, a contract or a grant to make it a deed. The deed to lead the uses does the argament no good, as it must be either a contract or a grant, and conveys an interest: so does a release, or a confirmation, or a disclaimer; but this power of attorney conveys only a bare authority. In the stamp acts the Legislature rank powers of attorney and deeds under different heads; powers of attorney bearing a different stamp from deeds.

BAYLEY, J. Bonds and mortgages, though deeds, pay different stamp duties.

**Rosanquet*, Serjt. The term deed in the stamp acts means, deeds

not otherwise charged.

Broderick. I was called on to cite cases, on the point that a covenant not to sue must be pleaded as a release; and the authorities on that point are, Deux v. Jefferies, Cro. Eliz. 352; Hodges v. Smith, Ib. 623; Ayliff v. Scrimsheire, 1 Show. 46; and the judgment of Buller, J., in Smith v. Mapelback, 1 T. R. 446. On the second point:—He contended, that, though for some purposes powers of attorney might be deeds, yet, as to the forgery of them, the Legislature always considered them as matter of separate legislation, distinct from deeds; and that, therefore, they were not within the purview of the statute 2 Geo. 2, c. 25.

The Judges reported their opinions to the King in council, and the prisoner was subsequently executed.

In addition to the cases cited by the Counsel for the Bank, there is that of Anne Lewis, reported by Mr. Justice Foster in his very able work on Crown Law (p. 116.) That prisoner was indicted for uttering a forged deed, which purported to be a power of attorney, under seal, from the administratrix of a deceased marine. The case received very great consideration; and the point principally in doubt was, whether it was a capital offence to forge the name of a person who did not exist, e. g., the daughter of a person who had no daughter. The twelve Judges held that it was: and their Lordships say—"The offence the prisoner standeth charged with is, the publishing as true a certain false, forged, and counterfeited deed, purporting to be a power of attorney from Elizabeth Tingle, with an intention to defraud, knowing it to be false. This is her offence; and it is one of the offences described in the act: for, it is to be observed, that the act, in describing the of face, doth not use the words, 'the deed of any person,' or 'the deed of another,' or any words of like import, but any false deed. Is the deed in question then a false deed, or is it ast — Undoubtedly it is. Was it published with an intention to defraud?—"It certainly was. This being so, it would sound very harsh, to say, that the prisoner's case is not brought within the letter and meaning of the act, because no such person ever existed as Elizabeth Tingle, the daughter of Richard."

OXFORD SUMMER CIRCUIT.

1824.

BEFORE MR. JUSTICE PARK, AND MR. JUSTICE LITTLEDALE

BERKSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PARK

REASON v. WIRDNAM.

A person cannot maintain an action for his trouble and loss of time in going to a place to become bail for another.

Assumpsit for work and labor.

One of the items of the plaintiff's demand was, for his trouble and loss of

time in going a journey to become bail for the defendant.

PARK, J. I am clearly of opinion, that, if a person takes a journey to become bail for another, he cannot maintain an action against such person, for his trouble or loss of time in such journey; because, he does not undertake the journey as work or labor, or as a person employed by the defendant; but he does it as his friend, and to do him a kindness.

Verdict for the plaintiff, for the other items of his demand.

Taunton, and Talfourd, for the plaintiff.

[Attornies-Dyne, and Mayor.]

(*Crown Side.)

BEFORE MR. JUSTICE LITTLEDALE.

REX v. JOHN BAYLEY.

On an indictment for forging of the names of two joint acceptors, one release by the bolder for valuable consideration to both of them jointly, is sufficient to make them competent witnesses to prove the forgery; and such release requires but one stamp. A release to one of two joint acceptors, inures to discharge both.

This prisoner was indicted for forging and uttering the joint acceptance of John Alexander and John Purkis, to a bill of exchange, drawn by the prisoner, and made payable to his order. The prisoner brought it, with the forged acceptance on it, to a person named Shelley, and indorsed it to Shelley, to whom he paid it for a horse.

To make Alexander and Purkis competent witnesses to prove their names forged, a release, to them jointly, was executed by Shelley, but it bore only one

The prisoner's counsel objected, that the release went to make each a com-

petent witness; and therefore it ought to have borne two stamps.

Littledale, J. As the liability was joint, the release might be joint to discharge it; and, I am of opinion, that if Shelly had given a release to one only of the two joint acceptors, it would have inured to the discharge of both.

The prisoner's counsel then objected, that the indorsee releasing the acceptors, might not be sufficient to destroy all their liability, as the prisoner, as drawer, might have some claim on their acceptance, though the indorsee had released his rights.

*Littledale, J., was clearly of opinion, that the acceptors were competent witnesses.

Verdict-Guilty.

Carrington, for the prosecution. Curwood, and R. B. Comyn, for the prisoner.

[Attornies—Frankum, and Compigny & Darvel.]

It is usual, on indictments for forgery, to call the party whose name is forged (he being released) to prove the forgery; but the forgery may be proved by persons acquainted with his handwriting. 2 Ea. P. C. 1002; and, in Newland's case, Le Blanc, J., allowed the forgery of the signature of a Cashier of the Bank, to a bank note, to be proved by a person acquainted with his handwriting; though such cashier might have been called, even without release, as he had no interest whatever in proving the note to be forged. But admitting this mode of proving a forgery to be sufficient, in point of law, which it certainly is, in a case so highly penal as forgery, a jury, using a very proper caution, will not, in general, convict, without the best evidence that can be procured, is adduced; and, therefore, it is expedient to call the party whose name is forged, and release him, if necessary; and, if that is not done, and the prosecutor relies on other proof of the forgery, he may very confidently anticipate the acquittal of the prisoner. Where the forgery is by altering a genuine instrument, it is usual to add a set of counts, charging the forgery to be by altering; but it was held, in the case of Rex v. Teague, Bay, on Bills, 430, that, where a man altered a 101. note to 501., he was rightly convicted of forging a note for 501. And in Rex v. Elsworth, Ib., the like was held; where the prisoner was charged with the uttering, and the alteration was by making eight into eighty. Great care ought always to be taken in setting out the forged instrument in the indictment; it must be set out exactly as it is: and if, by mistake, a word is inserted or omitted, the mistake must be copied in the indictment; and so figures must be set out as they are, and without release, as he had no interest whatever in proving the note to be forged. But dictment; and so figures must be set out as figures; abbreviations set out as they are, and the like; and, where the instrument does not appear, on the face of it, to be within any of the statutes against forgery, there must be proper averments to show that it is so; as, where a forged receipt is given on a navy bill, by merely writing the party's name on it; in such a case, there must be averments, that the signing the name imported a receipt; and, where the meaning is necessary to be shown, and does not sufficiently appear from the nature of the significant itself, there must be inuendoes.

*OXFORD ASSIZES

(Crown Side.)

REX v. SAMUEL KESSAL.

If two persons quarrel, and begin to fight, on equal terms, when one, finding himself not equal to his adversary, runs away, and, being pursued, draws his knife, and when overtaken by his adversary, stabs him; if death ensue, this would be only manslaughter; and, therefore, for such stabbing, the party cannot be convicted capitally under Lord Elleaborough's act. But if, before the conflict began, the party had drawn his knife in cool blood, in case death had ensued, the offence would have been murder.

This prisoner was indicted for cutting George Barefield, with intent to mur-

der, or do him grievously bodily harm.

The prisoner, on the night in question, was returning from a revel to Caversham, when he was overtaken by the prosecutor. Both were intoxicated, and a quarrel ensued; the prosecutor struck the first blow, and they fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued, and overtook him; on which the prisoner, who had taken out his

knife in his retreat, gave the prosecutor a cut across the abdomen.

Curvood, for the prisoner, contended, that he ought to be acquitted; because, if death had ensued, his client would only have been guilty of manslaughter: for, if two persons begin to fight on equal terms, and, during the conflict, the blood having become heated, one draw a knife, and death ensues, it will be but manslaughter; and this is very different from the case of a man going into the conflict with an original intention of using the knife; and he cited Ea. P. C. tit. Homicide, 243, where it is laid down, that "if on any sudden quarrel blows pass, without any intention to kill or injure another materially; and if, in the course of the scuffle, after the parties are heated by the contest, one kill the other by a deadly weapon, this will only be manslaughter; and Rex v. Taylor, 5 Burr. 2793; Snow's case, Leach, 138, which go to confirm this doctrine.

*Cross, contra, submitted, that it would be a question for the jury to consider whether the prisoner was actuated by a malicious intent, when

he ran away for the purpose of drawing the knife.

Park, J. The question that I shall leave to the jury is this, whether the prisoner ran back with a malicious intention of getting out his knife, to inflict an injury on the prosecutor, and so gain an advantage in the conflict? for, if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, I am of opinion, that, if death had ensued, the crime of the prisoner would have been murder; or, whether the prisoner, bona fide, ran away from the prosecutor with intention to escape from an adversary of superior strength, but, finding himself pursued, drew his knife to defend himself? as, in this latter case, if the prosecutor had been killed, the crime would have been manslaughter only.

Verdict-Not Guilty.

Cross, for the prosecution. Curwood, for the prisoner.

[Attornies—Blandy & Andrews, and Looker.]

In the case of Rez v. Taylor, 5 Burr. 2793, the prisoner and deceased had quarrelled in an alchouse, and the prisoner, who was a soldier, struck the deceased with a small cane; a scuffle and abusive language ensued, and the decease and others proceeded, with const

derable violence, to turn the prisoner out of the house; on which, the prisoner drew his sword, and turned round and killed the deceased. The Court of King's Bench, after taking time to consider, held the offence of the prisoner to be manslaughter only. In Sasw's case, the prisoner, who was a shoe-maker, was cutting the heel of a shoe with a common shoemaker's knife; and the deceased (some previous ill language having passed) seized the prisoner by the collar, and both rolled down into the cartway; while they were struggling on the ground, the prisoner being undermost, and the deceased upon him, the spection, it appeared, that the deceased had received three wounds from the knife; of one of which he died. After great argument and consideration, the Judges held this to be manslaughter. Through the whole current of authorities, the Judges appear to place the question on this point,—Whether the prisoner was originally actuated by malice in the outset, or whether his passion was first inflamed by something done to him by the puty killed? party killed ?

WORCESTER ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE LITTLEDALE.

DAVIES v. BINT, COOKE, et al.

On an information filed in the Crown Office, to recover penalties under the game laws, notice to a defendant in custody, indorsed on a copy of the information, to appear and slead or demur, or a plea and appearance will be entered for him under the statute 48 Geo. 3, c. 58, is not good, as that statute does not apply to informations of this sort. On such an information, if a verdict passes in favor of one defendant, and against another, the acquitted defendant is not entitled to his costs.

Whether, on the trial of such information, it is necessary that a defendant in custody, who has not employed either attorney or Counsel, should be brought into Court at the time of the trial? and if it is necessary that he should, whether he should be brought up by an order of the Judge of Nisi Prius, or by habeas corpus—Quere.

INFORMATION exhibited in the Crown Office against the defendants, for using dogs and snares for the destruction of game, whereby they had forfeited 51. to

the informer for each offence.† Three of the defendants were in custody under an attachment founded on this very information, and had not

† Penalties under the game laws are often sued for by information filed in the Crown Office, as all penalties may be, which are recoverable "by bill, plaint, information," &c.: and, to do this, an affidavit must be made of the facts of the case, and left with one of the clerks in Court of that office, who will prepare the information; which ought to consist of at least as many counts as there are penalties to be recovered. This, when engrossed, the informer himself must, in open Court, deliver into the hands of the Master of the Crown Office, within six lunar months after the offence. The venue must be laid in the true county: and as soon as the information is filed, the informer's clerk in Court will issue an attachment, on which the defendant will be arrested, and held to bail in 10% for his entering an appearance in the Crown Office; and if he does not put in such bail, he is thrown into prison, and there remains, without a trial, till he causes an appearance to be entered, by a clerk in Court, in the Crown Office; a period, where the party is ignorant and poor, (which is too often the case,) amounting to months, and sometimes years; as, if no appearance is entered, he stays in prison till the informer has charity enough to discharge him. However, on such appearance being entered, he is entitled to be discharged. cases, the general issue—not guilty; however, sometimes, a former conviction or acquittal Vol. XII —33 retained any counsel to defend them on the trial. It was, therefore, considered necessary that they should be in Court at the time of the trial; and the plaintiff's counsel applied to the learned Judge for his order to the keeper of the county

iail to bring them up.

LITTLEDALE, J., had never known such an order made, and was by no means sure that he had authority to grant it: this was a mere issue between these parties, sent out of the Court of King's Bench to be tried, and he did not see how, as a Judge of Nisi Prius, he could make such an order.

The Counsel for the plaintiff then wished the keeper of the jail to bring up those defendants, under an indemnity from Lord Plymouth,

the real plaintiff.

Curwood. If the keeper brings them up under such an indemnity, he, being keeper of the county jail only, must bring them through the city of Worcester, in which he, as keeper of the county jail, can have no authority; and therefore, by bringing them through the city, he would be guilty of permitting an escape.

The plaintiff's Counsel. These persons are not in the jail on any other warrant; and the plaintiff will undertake not to sue the keeper for any escape.

Carrington. Though the plaintiff may waive his action for an escape, yet, if the keeper is by these means guilty of permitting an escape, as soon as the parties are brought within the city, they may, if they please, refuse to remain in his custody; and if he insists on detaining them, they may maintain actions against him for false imprisonment.

LITTLEDALE, J. There is no doubt that the keeper need not accept of any indemnity of any kind unless he chooses; and I apprehend these defendants must either be brought up by order, or by habeas corpus. I will, therefore, as it is a new case, take it into my consideration, and determine on the proper

course.†

*However, before the learned Judge had decided on this point, the keeper was prevailed on to bring them up on an indemnity; but, before the case was gone into, they stated, that they had been imprisoned seven months on this information, without having been tried, and that they had now had no sufficient notice of trial; and that they were not prepared to defend themselves, and had not their witnesses in attendance.

The plaintiff's Counsel wished to go on, and said, that in cases of this sort, defendants were only entitled to the notice of trial indorsed on the information, under the statute 48 Geo. 3, c. 58; and the learned Judge allowed the trial to proceed, as every thing was admitted to be regular as to Cooke; and if the other defendants were irregularly tried, they would have the advantage in another stage.

Verdict—Cooke Not Guilty; the others Guilty.

Jervis, Taunton, and Russel, for the plaintiff. Curwood, and Carrington, for the defendant Cooke.

[Attornies—Robeson, and Gowland.]

(before a magistrate, or some other Court) for the same offence. The case is then tried like any other cause at Nisi Prius, no Attorney General's warrant of tales being required; and if the informer obtains a verdict, he has double costs, for which, with the penalty, s. f. fa. or ca. sa. may be issued. The practice on these informations will be very fully gone into, and precedents of the whole proceedings given, in the work of Mr. Gude, which is now in the press; and the law relative to these informations, is treated of at large, in Mr. Curwood's Edit. of Hawk. P. C. b. 2, c. 25, p. 368.

† This species of information being a mere civil proceeding to recover penalties, which, as Mr. Justice Holroyd observes, are in Law a debt to the informer as soon as he sues for them, it seems to be no more necessary to bring up the defendant, than it would be in an action of debt for a penalty; but, if it were necessary, it is difficult to see how a Judes

action of debt for a penalty; but, if it were necessary, it is difficult to see how a Judge of Nies Priss, as such, can make orders relative to prisoners in the jail: and, therefore

a writ of habeas corpus would seem to be the proper mode.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Curvood, who was now instructed on the behalf of the three defendants against whom the verdict had passed, now moved to set aside the verdict against them, and that they should be discharged out of custody, on the ground that the statute 48 Geo. 3, c. 58, did not apply to informations for the recovery of penalties. These defendants had been taken into custody, under an attachment issued out of the Crown Office.

LITTLEDALE, J. Under this sort of attachment you hold the party to bail in 10*l*. for his entering an appearance; on doing which, he is entitled to be discharged.

Curwood. The parties were in custody, and were served with a copy of the information in the jail, with a notice indorsed, that, unless within eight days after the delivery they caused an appearance and plea or demurrer to be entered, an appearance and plea of not guilty would be entered in their names, pursuant to the statute; and that the issue to be joined thereon would be tried, &c. This notice of trial was certainly irregular, being before issue joined, whether these informations were within the statute 48 Geo. 3, c. 58, or not: the plea and appearance were also irregular, if, as he contended, these informations were not within that statute.† The statute regarded only "offences to be

the stat. 48 Geo. 3, c. 77, and 35 Geo. 3, c. 96, enects, "That whenever any person shall be charged with any offence, for which he or she may be prosecuted by indictment or information in his Majesty's Court of King's Bench, not being treason or felony, and the same shall be made appear to any Judge of the same Court by affidavit, or by certificate of an indictment or information being filed against such person in the said Court for such offence, it shall and may be lawful for such Judge to issue his warrant under his hand and seal, and thereby to cause such person to be apprehended and brought before shin or some other Judge of the same Court, or before some one of his Majesty's Justices of the Peace, in order to his or her being bound to the King's Majesty with two sufficient sureties, in such sum as in the said warrant shall be expressed, with condition to appear is the said Court at the time mentioned in such warrant, and to answer to all and singular indictments or informations for any such offence; and in case any such person shall neglect or refuse to become bound as aforesaid, it shall be lawful for such Judge or Justice respectively to commit such person to the common jail of the county, city, or place where the offence shall have been committed, or where he or she shall have been apprehended, there to remain until he or she shall become bound as aforesaid, or shall be discharged by order of the said Court in Term time, or of one of the Judges of the said Court in Vaccation; and the recognizance to be thereupon taken shall be returned and filed in the said Court, and shall continue in force until such person shall have been acquitted of such offence, or, in case of conviction, shall have received judgment for the same, unless sooner ordered by the said Court to be discharged; and that where any person, either by virtue of such warrant of commitment as aforesaid, or by virtue of any writ of expises ad respondends issued out of the said Court, is now detained or shall bereafter be committed to and detai

prosecuted by indictment or *information, not being treason or felony;" which certainly did not include cases of pecuniary penalties recoverable by common informers. The statute also spoke of the party being brought up for judgment, which never was done in cases of pecuniary penalty; of the "prosecutor," and of the plea being not guilty, whereas the plea might be mic debet. It also mentions the party being "acquitted;" and further, this sort of notice could in no case be given, unless where the party was in custody on a Judge's warrant, or a capias ad respondendum, whereas these defendants were in custody on an attachment.

ABBOTT, C. J., observed, that it was important that the practice should be settled. And the Court granted a rule to show cause why there should not be a new trial, and ordered that a supersedeas should be issued to discharge the

defendants out of custody, on their appearance being entered.

Taunton, and Russell, now showed cause; and *contended that these informations were within the statute 48 Geo. 3, c. 58; because, using a net for the destruction of game was punishable by imprisonment, by the statute 13 Rich. 2, c. 13, and by 5 Anne, c. 14; and, therefore, was clearly an offence.

LITTLEDALE, J. There is no doubt that destroying game is an offence. BAYLEY, J. This act only applies to this Court; and these penalties are

recoverable in any Court at Westminster.
*HOLROYD, J. These penalties, when sued for, are, in Law, a debt [*446]

due to the informer.

Russel. The statutes recited in this act are, 26 Geo. 3, c. 77, s. 18, and 35 Geo. 3, c. 96, which relate to obstructing Excise officers only; but the statute 45 Geo. 3, c. 10, s. 41, enacts similar provisions for informations or indictments for offences against the quarantine laws; some of which are punishable by pecuniary penalties.

Аввотт, С. J. But some of them are punishable by indictment.

Russel. Mr. Curwood, in moving, relied much on the words "offence" and "acquittal;" but those words are continually applied on these informations by Blackstone and Hawkins; and it has been the uniform practice of the Crown Office to give this sort of notice to defendants in custody on these informations, the same as is done on indictments.

Curwood, and Carrington, contra, were stopped by the Court.

Where a statute only regards offences punishable by indictment or information, not being treason or felony, can we say that under those words an information by a common informer for the recovery of a pecuniary penalty is included? and ought a man to be taken under a Judge's warrant, and held to bail, for a mere pecuniary penalty !- No such thing was ever heard of.

Rule absolute.

Curwood moved, that the Master should tax the defendant Cooke his costs, he being acquitted, though a verdict had passed against his co-defendants: and he relied *on the words of the statute 18 Eliz. c. 5, s. 3, that, "if the informer shall have the trial or matter past against him by verdict or judgment of Law," the informer shall pay the costs; and he argued that the matter passed against the informer, as far as this defendant was concerned.

in the said Court to such indictment or information, for such person, and such proceedings in the said Court to such indictment or information, for such person, and such proceedings shall be had thereupon as if the defendant in such indictment or information had appeared and pleaded not guilty according to the usual course of the said Court; and that if upon the trial of such indictment or information any defendant so committed and detained as aforesaid shall be acquitted of all the offences therein charged upon him or her, it shall be lawful for the Judge before whom such trial shall be had, although he may not be one of the Judges of the said Court of King's Bench, to order that such defendant shall be forthwith discharged out of custody as to his or her commitment as aforesaid, and such defendant shall be thereupon discharged accordingly. Per Curiam. The language of this statute is so similar to that of 23 Hen. 8, c. 15, on which the opposite construction has been put, that the Court think they cannot award costs to one of several defendants, who is acquitted, a verdict passing against the others.

Rule refused.

PIERPOINT v. SHAPLAND.

If affirmative pleas are pleaded with the general issue, the plaintiff may, if he chooses, give in evidence any matter that goes to destroy the justifications, so pleaded by way of anticipating the defence; or he may content himself with proving the facts alleged in the declaration, and let the defendant make out what he can in justification, and trust to answering it by evidence in reply; but if he does this, he will be restricted to such evidence as goes exactly to answer the case attempted to be made out by the defendant in support of his pleas.

ACTION for words spoken of the plaintiff, a surgeon and apothecary, imputing to him want of medical skill. Pleas—1st, General Issue; 2d, that the words were true.

The speaking of the words having been proved, the plaintiff's counsel suggested, that the defendant should enter on his defence on the justification of the truth of the words, and then, they (the plaintiff's counsel) should go into evi-

dence to disprove such justification.

LITTLEDALE, J. When affirmative pleas of justification are put on the record with the general issue, the plaintiff's counsel may, if they please, not only prove the facts of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into any evidence which goes to destroy the effect of the justifications, by way of anticipating the defence: or they may, if they please, content themselves with proving the *fact on the general issue, and then close their case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply, as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved by the defendant in support of the justifications, and they cannot be allowed to go beyond it.

Verdiet for the plaintiff—Damages, 39s.

Jervis, Campbell, and Ryan, for the plaintiff Russel, and C. Phillips, for the defendant.

[Attornies-Parker, and Long.]

STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PARK.

HAYWARD v. GRANT.

In trespass quare clausum fregit on several days. Plea, leave and license to the whole. If some of the trespasses were committed after the license was revoked, the plaintiff need not new assign, as the defendant, by his plea, undertakes to prove a license sufficient to cover all the acts of trespass.

If the plaintiff is tenant of A, and has agreed that A, shall give three persons license to sport over the lands, and the defendant has such a license fron A, such a license will not support the plea of leave and license by the plaintiff.

TRESPASS quare clausum fregit on a certain day, and on divers other days, &c. Pleas—1st, General issue; 2d, Leave and license as to the whole of the alleged trespasses. There was no new assignment, but a replication de injuria.

*Before the case was gone into, Campbell, for the defendant, observed, that the plaintiff's case was, that there had been several acts of trespass, some committed under a license, and some, after that license had been revoked. Now, if the plaintiff meant to go on these latter, he should have new assigned, instead of replying as he had done.

PARK, J. Does the license cover every day?

Curwood. It does, my Lord: and I submit, that though if the plaintiff had declared on one act of trespass, and leave and license had been pleaded, and the plaintiff had intended to go on some act of trespass after the license was revoked, he must new assign: yet, if many trespasses are declared on, as they are here, under the words "and on divers other days," and leave and license is pleaded to the whole of them; if some of the acts of trespass are before a revocation of the license, and some after, it is sufficient to deny the leave and license pleaded, without new assigning. And he cited Barnes v. Hunt. 11 East, 451.†

PARK, J. Under that authority the case must be gone into.

It was then proved, on the part of the plaintiff, that he gave the defendant notice not to trespass on his lands; and that, afterwards, the defendant came on his lands, and shot one of the plaintiff's tame ducks.

*Campbell, for the defendant, opened, that the plaintiff held the lands under a person named Ogle, subject to an agreement for Ogle, and persons authorized by Ogle, to come on the lands to sport; and that Ogle gave such an authority.

Curwood. It is a clear principle of law, that if a man, having a license, exceed his license, he is a trespasser ab initio. Now, here, though the defendant might have leave to come on the land to sport, yet, if he came on the land to shoot tame ducks, that was not within the license, and he would therefore be a trespasser.

PARK, J. We had better have evidence of what the license exactly was.

[†] In Barnes v. Hunt, 11 East, 451, the plaintiff had declared for trespasses committed on divers days. Plea—leave and license to the whole. Replication—de injuria. The defendant gave evidence of a license which covered some but not all the acts of trespass; and the Court of King's Bench held, that the plaintiff was entitled to recover without having new assigned.

For the defendant, an agreement, under which the plaintiff held the land of Ogle, was put in. It reserved to Ogle a liberty of fishing and sporting over the land; and further provided, that he should have power to authorize any other persons to do the like; but that the plaintiff should not have authority to permit others to do so: and it was proved that Ogle had given such an authority to the defendant.

The plaintiff's counsel then objected, that the defendant had pleaded a license from the plaintiff, and had given evidence of a license from the plaintiff's lessor, which license, it was contended, the lessor had a right to give under a particular agreement. The evidence, therefore, did not support the plea of license by the plaintiff, and they had even shown that such a license could not

be given by the plaintiff.

PARK, J. On the plea of license, I am with the plaintiff: but I think I had better nonsuit; because it may be a question, whether this was the land of the plaintiff for this purpose; for, if it were not the land of the plaintiff for this purpose, I think the defendant would be entitled to a verdict on the general issue.

Nonsuit, with liberty to move to enter a verdict for the plaintiff.

Curwood, and Bale, for the plaintiff.

Campbell, for the defendant.

[Attornies-Jones, and Wood.]

COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., GRAHAM, GARROW, AND HULLOCK, BS.

In Banc.

Bale moved, in pursuance of the leave given by the learned Judge at the trial, to enter a verdict for the plaintiff.—The Court granted a rule to show cause.

GREEN, Executrix of BOWERS, v. DAVIS.

Whether a plaintiff can recover on an instrument in the following terms: "Received of Mr. D. B. 1001, which I promise to pay on demand, with lawful interest, J. D." on an agreement-stamp, and a three-penny receipt stamp—Quare.

Assumestr on a promissory note, with the common money counts, brought by the plaintiff as executrix of her former husband. Pleas—the general issue, and the statute of limitations.

The note was in the following form:—

"December, 28, 1813.

"Received of Mr. Daniel Bowers one hundred pounds, which I promise to pay on demand, with lawful interest.

Joseph Davis."

*452] *This was written on a three-penny receipt stamp; and a one pound agreement stamp had also been put upon it at the Stamp Office, on payment of the penalty.

To take this case out of the statute of limitations, a witness proved, that on an application being made to the defendant to send Mrs. Green "a little of her interest money," the defendant said, that he would bring her money on the next Sunday week.

Taunton, for the defendant, objected, that as the paper in question had not any note stamp, it was not admissible in evidence as a note; and as a three-penny stamp was not proper for a receipt for a hundred pounds, it was not

admissible in evidence as a receipt.

The plaintiff's Counsel contended, that, stamped as it was, it was admissible in evidence as an acknowledgment of so much of the plaintiff's money being in the defendant's hands, which would entitle the plaintiff to a verdict on the count for money lent.

PARK, J., directed the jury to find for the plaintiff.

Verdict for the plaintiff.

GREEN v. DAVIS.

Whether one admission of liability to pay a debt can be applied to two distinct causes of action between the same parties—Quere.

This case was between the same parties as the last, and was on another promissory note: but, in this case, the plaintiff sued in her own right, and not as executrix. In this case, as in the former, the statute of limitations was pleaded. The note was in the following form:

"Received of Mrs. Betty Bowers eighty pounds, lawful money, which I promise to pay on demand. Joseph Davis."

This note bore the same stamps as the note sued on in the former case, and *Taunton* repeated his objection.

To take the case out of the statute of limitations, the same admission of the defendant, which was used in the former case, was again given in evidence.

Taunton said, that, however this acknowledgment might operate in the former case, it could not apply in this; for, besides that such an admission could only operate once, it plainly applied to the former note, as it respected interestmeney, that note carrying interest, which this did not.

PARK, J., in this case also directed a verdict for the plaintiff.

Taunton, for the defendant.

[Attornies—Lee, and Maudesley.]

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Taunton now moved for a new trial in both the actions, on the objections taken by him at the former trial; and the Court granted a rule to show cause in each case.

See the cases of Firbank and Another v. Bell, 1 B. & A. 36; and Butts and Other, Assigness of Fosset and Others, v. Swann and Others, 4 J. B. Moore, 484.

*SHROPSHIRE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PARK.

REX v. RICHARD BEACALL; Same v. GEORGE WELLINGS.

Held by the twelve Judges, that, if a servant receives money on his employer's account, and embezzles it, he is guilty of a felony, though his employers had no right to it, and were wrong doers in receiving it.—Held, that if under an act of Parliament, the property in goods, chattels, furniture, clothing, and debts, are vested in certain directors of the poor; yet the property in money, and securities for money, are not vested in them by those words.

In an indictment for embezzling money, it is not necessary to state from whom the money so embezzled was received.

SO CHIDELY WES ICCUIVED.

THESE prisoners had been tried at the preceding assizes, and their cases reserved for the consideration of the twelve Judges (see ante, pages 310—315;) and as soon as the grand Jury had been sworn, the prisoners were placed at the bar.

PARK, J., addressed them to the following effect:—You were severally indicted at the last assizes, for embezzling the monies of your employers; and to the indictments found against you several objections were made; among mem, were two on the facts proved, and one in arrest of judgment. On the facts of the case against you, Richard Beacall, it was objected, that the money embezzled by you (a composition for a bastard child) was money not due to your employers, and money which they could never have recovered; and that, as it was never their money, you could not be guilty of the crime of embezzlement, in converting it to your own use. I, at first, thought there was something in this objection. I was attracted by the ingenuity of it. But, on consideration I am convinced there is nothing in it; for it is clear that you received it for and solely on account of your employers, and by virtue of your employment and afterwards secreted and embezzled it. The 2d objection, on the facts of both your cases, is, that, by a most confused act of Parliament, a corporation of *guardians of the poor are constituted, and every count in the whole of the indictments against you states the monies embezzled to be the property of the directors; whereas, under the terms of this act, the property is in the guardians. This I considered to be fatal. However, I reserved the point for the opinion of the twelve Judges, who are unanimously of opinion that it is so: and, on this ground, his Majesty has been pleased to grant his most gracious pardon to you both. The point in arrest of judgment was, that the indictments did not state from whom the money embezzled had been received: but, as the indicaments follow the words of the statute, and state that the money was received by you for your employers, and by virtue of your employments, the Judges are unanimously of opinion, that that is sufficient, without saying from whom the money was received. His Majesty's pardon only relates to the two indictments on which you have been convicted. The other indictments, on which you were not tried, (fourteen in number,) are, however, all open to the second objection; but they cannot be quashed, because there is nothing vicious on the face of them, and the only defect is, that the allegations contained in them cannot be supported by proof. Therefore acquittals must be taken on them.

Verdicts of not guilty were then taken on the other fourteen indictments.

REX v. BEACALL & WELLINGS. O. C. 1824. [455 266

No pardon under the Great Seal had been actually granted for either of the prisoners; but for each of them a sign manual of his Majesty, under his privy signet, and countersigned by Mr. Secretary Peel: one of which ran-

"GEORGE R.

"Whereas, Richard Beacall was, at the last assizes holden for our county of Salop, tried and convicted of robbing the Directors of the Poor of Shrewsbury."

*It then stated it to be his Majesty's intention to grant him a free pardon "for his said crime," and that his name should be inserted in the next general pardon for the Oxford Circuit. The other sign manual was similar, with only a change of the name.

The prisoners' Counsel, on this, suggested that neither of the prisoners could be indicted again for the crime so pardoned, though in such second indictment the property might be laid in the Guardians of the Poor, because his Majesty's

pardon applied to the offence itself and not the mode of laying it.

However, this point was not decided, as the indictments subsequently preferred were for distinct offences, not included in any of the former indictments.

Bather, and Russel, for the prosecution.

Curwood, and Slaney, for the prisoner Beacall. Curwood, and Carrington, for the prisoner Wellings.

[Attornies—Cooper, for the prosecution; Watson & Harper, for Beacall; and Nock, for Wellings.

Pardons, are either general pardons by act of Parliament, or special pardons under the Great Seal; and even the former must be pleaded if there are any persons excepted out of their operation; and if there be, which always has been the case, the prisoner must by pleading, aver that he is not one of the excepted parties. A pardon under the Great Seal must be always pleaded; but in cases where the King's pardon has not passed the Seal must be always pleaded; but in cases where the King's pardon has not passed the Great Seal, the Judge of assize will, on the production of his Majesty's sign manual, (if the prisoner is not detained on any other charge,) admit him to bail, in a recogn'zance, conditioned for him to appear and plead his pardon. By the stat. of 13 Rick. 2, c. 1, the King's pardon does not extend to the pardoning of treason, murder, or rape, unless such "offences are pardoned in express words: and, in all cases, his Majesty's pardon and the Great Seal would receive a most narrow construction; but, I believe, it is usual, in such pardons, for his Majesty to extend his pardon to the offence in whatever manner it may be described; and also whether the prisoner has been indicted (or it or not. But every charter of pardon must depend on the express words contained in it; but his Majesty's sign manual, expressing his royal intention to pardon, receives a liberal con-Majesty's sign manual, expressing his royal intention to pardon, receives a liberal construction, and is therefore not drawn up with any particular degree of formality.

In actual practice, a plea of pardon is never seen, the prosecution being always considered at an end when his Majesty's sign manual is issued. For the law respecting the affect and construction of pardons, see Curw. Hawk. B. x. c. 37.

Another law their description of pardons, see Curw. Hawk. B. x. c. 37.

Another plea, which is certainly good, and so laid down in all the books, is, a plea that the prisoner is attainted, and that such attainder is still in force and unreversed. But this plea never has been used in modern times, and I believe there is no precedent of it in any printed collection, ancient or modern.

Pleas of autrefois convict, and autrefois acquit, are not uncommon.

REX v. RICHARD BEACALL; Same v. GEORGE WELLINGS.

If a person is *employed* as the servant of a corporation, and embezzles their money, he seguilty of felony, though he was not duly appointed their servant, r.or even appointed at all under the common seal.

THESE prisoners were indicted for embezziement.

The indictments were in the usual form, and it is I the former prisoner, as

steward, and the latter, as clerk, to the guardians of the poor of parishes in the town of Shrewsbury, in the county of Salop, and the suburbs thereof, and laid the property in that corporate body.

(For the provisions of the private act of Parliament, under which they were

incorporated, &c., see ante, page 310.)

A witness produced the written appointments of the two prisoners to their respective situations of steward and clerk to the corporation. They bore date 1816, and were "for one year next ensuing." It did not appear that either of them had been re-appointed. Other witnesses proved that they had paid them the several sums that *each was charged with embezzling in the course

of the year 1823, and that they had not accounted for them.

The prisoners' Counsel contended, that, to make a person guilty of the crime of embezzlement, he must be the servant of the person whose money he embezzles; and he must receive it by virtue of his employment as a servant. Now these men were charged to be servants of a corporation; and a corporation must appoint its servants according to its powers, either by its common seal, or under the provisions of some act of Parliament. For the first year, these men were duly servants of the corporation; but as they were neither re-appointed under the common seal, nor according to the terms of the private act, their existence, as servants of the corporation, ceased at the expiration of that year; and they could not be continued as servants permissively, as a corporation can do nothing except under its common seal, or under some special power.

PARK, J. I think this is sufficient. The statute 39 Geo. 3, c. 85, enacts, that if any person, "employed in the capacity of a servant or clerk to any person or persons, body corporate or politic, shall embezzle," &c.;† therefore, if the person be employed as a servant or clerk, he may be guilty of this crime, though he is not duly *appointed, nor even appointed at all under the common seal.

Verdict-Guilty.‡

Bather, and Russel, for the prosecution. Curwood, for the prisoner Beacall. Curwood, and Carrington, for the prisoner Wellings.

a .esp. "E

[Attornies—Cooper, for the prosecution; Watson & Harper, for Beacall; and Nock, for Wellings.

† The words of the stat. 39 Geo. 3, c. 85, are, "If any servant or clerk, or any person employed for the purpose in the capacity of a servant or clerk to any person or persons whomsoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for, or in the name, or on the account of his master or masters, employers or omployers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers," &c.; and the offender, and those who are accessories to his crime, are to be subject to transportation for any and those who are accessories to his crime, are to be subject to transportation for any term not exceeding fourteen years.

The prisoners were subsequently sentenced to fourteen years' transportation.

BEFORE MR. JUSTICE PARK.

JONES v. JOHN WILLIAMS.

If a Justice of the Peace acts, believing that his jurisdiction extends to the subject matter in question, he is entitled to notice of action, though it may turn out, on investigation, to be a case over which no Justice of the Peace has jurisdiction. If the King, by charter, appoints two aldermen to govern a borough; and, by another clause in the charter, gives the aldermen authority to act as Justices of the Peace; and, by another clause, empowers such aldermen to appoint persons to be deputy aldermen; whether such deputy aldermen are also deputy Justices of the Peace—Quere. And if they are, whether, as deputy Justices of the Peace, they are entitled to notice of action—Quere. Whether the statute 4 Geo. 4, c. 34, s. 3, gives Justices authority over menial servants who misbehave in their service—Quere. If a person claims a right to act as a Justice, he is entitled to notice of action, though the ground on which the plaintiff goes is a denial of such right.

FALSE imprisonment. Plea—General issue.

For the plaintiff, it appeared, that a person named Hughes, with whom the plaintiff lived as a housemaid, had complained to the defendant, (who professed to act as a deputy to John Copner Williams, one of the aldermen of the town of Denbigh.) that the plaintiff had absented herself from her employment; on this complaint the *defendant caused a constable to bring the plaintiff before him; and he, after an examination, committed her for one month to the Bridewell at Ruthen, under a warrant, which was produced by the jailer. The warrant was in the following terms:—

"Borough of Denbigh, to wit:

Whereas information and complaint has been made before me, John Copner Williams, [the defendant's principal,] one of his Majesty's Aldermen and Justices appointed to keep the peace in and for the said borough,—(it then stated the complaint of Margaret Hughes.)—And whereas I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint, and upon consideration had thereof, have adjudged and determined —(here followed the adjudication)—and I do hereby order, as a punishment for the said offence, that the said Elizabeth Jones—(it then ordered an abatement of her wages, and that she should be imprisoned for one calendar month.) Given under my hand and seal, &c.

(Signed,)

J. C. Williams,
by his deputy, John Williams.
[L. S.]"

However, after she had been in prison for ten days, the defendant ordered her to be liberated. The plaintiff was in fact never examined before the defendant's principal. Mr. John Comes Williams

ant's principal, Mr. John Copner Williams.

The defence was, that by a clause in a charter granted to the town of Denbigh by King Charles II., two aldermen are to be appointed; and they are empowered to execute by themselves, or, in their absence, by their deputies, at the offices of aldermen." And by another clause in the same charter it was ordained, that the aldermen, during the time they should remain in their offices, should be Keepers and Justices of the Peace, and should have power to inquire, hear, and determine all matters which belong to the office *of a Justice [*461 of the Peace. One of the aldermen, named John Copner Williams, had gone out of the borough, and had appointed the defendant his deputy alderman; and the defendant acted as a deputy alderman at the time of this commitment.

The appointment was in the following terms:-

"Know all men by these presents, that I, John Copner Williams, of the Borough of Denbigh, and one of the Aldermen and Justices of the Peace in and for the said borough, have made, ordained, and deputed, and by these presents, by virtue of the power and authority given and granted in such cases by the charter of King Charles the Second, and all other powers and authorities me thereunto enabling, do make, ordain, and depute John Williams, of, &c. one of the capital burgesses of the said borough of Denbigh, and residing therein, to be an Alderman and Justice of the Peace in and for the said borough, in my place and stead, to do all legal acts relating to the said office in my name, and to hold, exercise, and enjoy such office during my absence from the said borough, or until another person shall be lawfully appointed to the office in my stead, according to the ancient usage of the said borough, and in pursuance of the said charter. In witness whereof I have hereunto set my hand and seal, the (6th November, 1823.)

John Copner Williams, [L. S.]

Signed, sealed, and delivered, &c."

Campbell, for the defendant, contended, that on these facts the plaintiff ought to be nonsuited. 1st. Because that, under the charter, the defendant was a Justice of the Peace. It was clear law, that, under particular charters authorising it, judicial offices might be delegated; that had been recently decided in the Court of King's Bench:† and, in point of fact, the Recorder of London appoints *a deputy, who tries criminal cases; and there have been instances of the Judges of Wales doing the like. And as by this charter the altermen are to be Justices, and may appoint deputies, he contended that the deputy alderman was authorised to do all acts that the alderman might do if he were there, as well judicial as otherwise: and it clearly must be so; as in this place, (one of the aldermen having left the town,) there would be only one Justice remaining, if the deputy alderman did not make a second Justice; and the consequence would be, that all business requiring two Justices could not be done; and in that town there would be no authority to allow a poor's rate, remove a pauper, or do many other acts. 2d. That if the defendant acted as a Justice, he had authority to commit the plaintiff under the statute 4 Geo. 4, c. 34, s. 3, which gave Justices a jurisdiction over all persons who have contracted to serve others, and have misbehaved in such their service. And 3d. That even if the defendant had exceeded his jurisdiction in committing the plaintiff, yet he was entitled to notice of action: and, further, that in this case the plaintiff was not entitled to try the question whether, under the words of the charter, the defendant had authority to act as Justice, without giving him previous notice of action, as he had, at all events, a fair claim of a right to act as such.

C. Phillips, Godson, and J. Jervis, for the plaintiff, contended, on the first point, that, however it might be lawful to delegate judicial powers under the express provisions of an authority from the Crown, yet that never ought to be allowed, unless such authority were clearly and explicitly given; and that here, by the charter, the defendant had no authority to act as a Justice; for, that though the charter empowered an alderman, going out of the town, to appoint a deputy alderman, it nowhere empowered him to appoint a deputy justice; and it was to be *said, that the power of acting as a justice, was a part of the office of an Alderman of Denbigh, but that was really not so, as

the only authority that any one had to act as a justice of that town, was the clause that the *aldermen* should be keepers and Justices of the Peace. Now this clause, they contended, was not sufficient to justify the delegation of judicial powers to a deputy alderman; and that all the functions of a deputy alder-

[†] See the case of Rez v. Mayor of Gravesend, 4 Dow. & Ry. 117.

man, qua deputy alderman, would be of a corporate, and not of a judicial nature. As to the second point, the statute 4 Geo. 4, c. 34, s. 3, enacts, that "If any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person, shall contract with any person or persons whomsoever, to serve him, her, or them," and shall misbehave, the justices shall have a jurisdiction to punish them by three months' hard labor. It was, on this, contended, that this housemaid came within the description other person. Now, this phrase clearly was not meant to comprehend menial servants, because another description of servants was expressly mentioned: namely, "servants in husbandry," and also because the words other person, being used with the words "miner, collier, keelman, pitman, glassman, potter, and laborer," clearly showed that the legislature meant other persons ejusdem generis. One the third point, they contended, that the defendant was not entitled to notice of action; for that, here, they not only contended, that the defendant had exceeded his authority if he were a justice, by committing a person over whom he had no jurisdiction, but they denied that he was a justice at all; and that though, if a man be admitted to be a justice, you must give him notice of action if he has exceeded his authority; yet, if he is not a justice at all, he is not entitled to any nouce; and a person merely assuming to himself the powers of a justice, is not thereby entitled to notice of action.

*PARK, J. On the construction to be put on the statute 4 Geo. 4, c. [*464 34, I do not feel myself bound to give any opinion; and as to the other points:—It is in the first place clear, that where judicial officers have a power given them by the Crown, in their appointment, to delegate their powers, they may lawfully do so; as has been instanced in the cases of the Recorder of London, and the Judges of Wales, who have such a power given them; but the Judges of England cannot delegate their powers, because no such authority is given them by the patents, under which they hold their offices. Under this charter from the Crown, the defendant claims a right to act as a justice of the town of Denbigh, by virtue of his office of deputy alderman; and I am clearly of opinion, that, as he claims, by virtue of this office, so to act, he is entitled to notice of action, if his claim to this right is disputed; and I think, that, no notice having been given in this case, the plaintiff must be nonsuited.

Nonsuit.

C. Phillips, Godson, and J. Jervis, for the plaintiff. Campbell, for the defendant.

[Attornies-Jones, and Williams & Evans.]

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Godson moved to set aside the nonsuit in this case, on three points. 1st. That the defendant was not by the charter entitled to act as a Justice of the Peace, for that he was only deputy as Alderman; and that judicial *authority was not allowed to be delegated, unless by the express words of some act of Parliament or charter. 2d. That however a Justice might be entitled to notice of action, the defendant, being a deputy Justice, was not; and

it would be observed that he did not act in his own name, the name of Copner Williams, his principal, appearing throughout the proceedings; and even the signature was "J. C. Williams, by John Williams, (the defendant,) his deputy." And 3d. That even if he were a Justice, he had no authority over the plaintiff, as a domestic servant; and, therefore, as he was acting on a subject matter over which he had no jurisdiction, he was not entitled to notice of action.

ABBOTT, C. J. If he acted as a Justice, bona fide, he is entitled to notice

of action, though he exceeded his authority.

Godson. If he had authority over the subject matter of the offence, he would be entitled to notice; but if it is a subject matter in which no justice at all can have a jurisdiction, I submit that he would not be entitled to such notice. And he cited Prestidge v. Woodman, 2 Dow. & Ry. 43.

BAYLEY, J. If a Justice acts on a bona fide belief that he has authority

over the subject matter, he is entitled to notice of action.

The Court granted a rule nisi, on the first and second points, and refused it on the third point.

In the case of Molins v. Wetby, 1 Lev. 76, it is stated, that the Recorder of London, the Recorder of Northampton, and the Steward of the Borough Court of Southwark, all appoint depaties to do their duties. The Judge of the Palace Court is also a deputy to effect the Knight Marshal; and in the recent case of Rex v. The Mayor and Jurats of Gravesend, 4 Dow. & Ry. 117, Mr. Justice Gazelee (then at the bar) said, arguends,—"Undoubtedly, he (the Mayor) could have no authority to delegate his judicial functions, inasmuch as the charter makes no mention of any such power."

On the construction of the statute A. Grav. 4. 34 a. 3 are the case of Loretter v. Earl of

On the construction of the statute 4 Geo. 4, c. 34, s. 3, see the case of Lowther v. Earl of Reder and Another, 8 East, 113, which was a case much considered as to the construction of the statute 20 Geo. 2, c. 19, which, in many respects, resembles the act in question. With regard to the notice of action to be given to a Justice, the case of Prestidge v. Woodman, 2 Dow. & Ry. 43, decides, that, if the place where the cause of complaint srises, is out of the Justice's jurisdiction, he is still entitled to notice of action; and the Court held, that where he acts qua magistrate, though erroneously, he is entitled to it: and Mr. Justice Bayley says, that "many cases have decided that, though the Justice exceeds his powers, yet, if he is acting bona fde, and under the supposition that he is right, he is entitled to notice; the object of the notice being, that, if he is wrong, he may set himself right by tendering amends." And in the case of Weller v. Toke, 9 East, 364, the Coart held the Justice entitled to notice of action, though he alone had committed a person in a case in which not less than two Justices have jurisdiction. And in the case of Daniel v. Wilson, 5 T. R. 1, it was held, that an Excise officer, acting in the supposed execution of his duty, was entitled to notice of action. In that case, the Excise officer had assaulted an innocent person, supposing him to be a smuggler then actually employed in running goods.

Fe mere on this subject see the notes to Levy & Edwards, ante, p. 40.

HEREFORD ASSIZES.

(Civil Side.)

BEFORE MR JUSTICE PARK.

PRICE v. BOULTBY.

Fractice.—When a copy of an agreement sued upon is delivered to the defendant, in pursuance of a Judge's order for that purpose, the Judge will, in general, make it a part of that order that the defendant shall consent to make no objection to the stamp.

Assumpser on an agreement to build a house according to an annexed specification. The agreement was put in. It had been stamped at "the stamp office [*467

(upon payment of a penalty of 5l.) with a one-pound stamp.

Taunton objected to its being read, till it was ascertained whether the agreement, and the specification which was to be taken as part of it, contained more than 1080 words; for that if they did, (however they might have been stamped at the stamp office,) they required a stamp of 11. 15s. As his client had no duplicate of the agreement, he could not prove that it contained more than 1080 words; but the copy delivered under a Judge's order contained more than that number.

PARK, J. I think I ought not to admit these papers as evidence without the words being counted; but, in general, when a defendant asks as a favor to have a copy of an agreement sued upon, under the order of a Judge, the Judge will make it a condition, on the granting of such order, that he shall make no objection to the stamp; as such objections entirely defeat the justice of the

case.

The associate was proceeding to ascertain whether there were more than 1080 words or not, when, at the suggestion of the learned Judge, the cause was Referred.

Campbell, and Twiss, for the plaintiff. Tenonton, and Cross, for the defendant,

[Attornies-Farlow & A., and Spencer.]

*MOORE v. WILLIAMS.

F*468

That part of the statute 13 Geo. 3, c. 51, which relates to the plaintiff paying costs to the defendant in personal actions arising in Wales and tried in England, unless 101. are recovered, is wholly repealed from the 24th June, 1824; and the 21st section of 5 Geo. 4, c. 106, enacting nearly similar provisions, except 501. be recovered, did not come into operation till the 6th November, 1824: so that, in all actions tried between those days, neither of the statutes applies, and the plaintiff gets the same costs as if the cause arose entirely in England.

THIS case was referred to arbitration; and the arbitrator directed a verdict to be entered for the plaintiff, for 5*L*, which was accordingly done.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Campost moved to enter a judgment of nonsuit in this case. By the statute of 13 Geo. 3, c. 51, s. 1, it was enacted, that, in all personal actions, where the cause of action arose in Wales, and the venue was laid in England, unless the plaintiff recovered 10l., there was to be a judgment, as in case of nonsuit, and the defendant was to be entitled to his costs. But by the 5 Geo. 4, c. 106, this statute is absolutely repealed; and it is enacted, (§ 21,) that in all personal or transitory actions, commenced after the 6th of November, 1824, where the

defendant is a resident in Wales, or the cause of action arose there, and the venue is laid in *England*, there shall be judgment, as in case of nonsuit, unless the plaintiff recovers 50l., and the defendant shall have his costs. This statute received the royal assent on the 24th of June, 1824. The present action was, therefore, tried after the passing of the statute 5 Geo. 4, c. 106, and, consequently, after the repeal of the older statute: but he contended that, as this action was commenced before the older statute was repealed; and as no provision was made in the new statute for actions brought before the repeal in which verdicts were recovered after it; the repeal of the statute ought not, in fairness, to be taken to extend to them, as *none of the new provisions extended to them. And he cited Ashburnham v. Bradshaw, 2 Atk. 36, and Gilmore v. Shuter, 2 Lev. 227.

ABBOTT, C. J. The repeal of the old act is immediate; but can you find any authority to warrant such construction as you contend for—that the repeal of an act is not to extend to all cases, because the newly substituted provisions do not?

Campbell. If the construction I contend for does not prevail, in all actions commenced before the 6th of November, 1824, the smallest damages will now carry full costs; though by the act of 5 Geo. 4, the Legislature intended that nothing less than a verdict for 50l. should entitle the plaintiff to his costs.

BAYLEY, J. It is better that that inconvenience should be submitted to, than

to let in the evils of so bold a construction as that contended for.

Rule refused.

By the stat. 5 Geo. 4, c. 106, s. 21, it is enacted, "that in all actions upon the case for words, action of debt, trespass on the case, assault and battery, or other personal action, and all transitory actions, which, from and after the 6th of November, 1824, shall be brought in any of his Majesty's Courts of Record out of the Principality of Wales, and the debt or damages found by the jury shall not amount to the sum of 504.; and it shall appear upon the evidence given on the trial of the said cause, that the cause of action arose in the said Principality of Wales, and the defendant or defendants was or were resident in the dominion of Wales at the time of the service of any writ or other mesne process, served in such action, and it shall be so testified by the Judge on the back of the Nisi Prins record, or the facts suggested on the record or judgment roll, a judgment of nonsuit shall be entered, and the plaintiff pay the defendant or defendants his or their costs; and the plaintiff shall be allowed, out of the costs, the sum awarded to him by the 470 verdict: and though no judgment is entered for the plaintiff, yet the "verdict, without any judgment, shall be a good bar against the plaintiff.

But by \$22, nothing in this act is to preclude any person from bringing his action in England, and obtaining full costs, if the Judge certifies on the back of the record that the title or freehold of land was chiefly in question, or that the cause was proper to be tried in an English county.

in an English county.

In the case of Ashburnham v. Bradshaw, 2 Atk. 36, there was a devise to charitable uses under a will of 1734; but the testator lived till July, 1736, a month after the statute of mortmain passed, without altering his will; and it was referred by the Court of Chancery to the Judges to say, whether this was a good disposition to charitable uses; and all of them except Mr. Justice Denton, (who was ill.) certified that this bequest was good, notwithstanding the act, and the Chancellor decreed accordingly.

The case of Gilman v. Shuter, 2 Lev. 227, was assumpset to pay money for a marriage portion. The promise was made before the passing of the statute of frauds; and it was resolved by the Judges, that, though the statute says, that after the 24th day of June, 1677, no action shall be brought on any promise in consideration of marriage without writing, yet that does not extend to such a promise made before the 24th June, 1677; although the action on it may have been brought after that day.

although the action on it may have been brought after that day.

REX v. DAVIS et al.

In the Nisi Prus record of an indictment, removed by certioreri, the names of the grand jurors who found the indictment need not be inserted in the caption.

INDICTMENT for a riot and assault, found at the Great Sessions of Glamor-

ganshire, and removed into the Court of King's Bench by certiorari.

In the caption of the indictment, as stated on the *Nisi Prius* record, the names of the grand jurors who found the bill were not set out; but it was only stated, that by the oath of *twelve* good and lawful men, sworn and charged to inquire, &c., it was presented, &c.

Campbell, and Maule, objected, that the names of the grand jurors ought to have been set out, because the defendants might show that some of the persons who *formed the grand jury were incapable of being grand jurors, as [*47]

that they were persons attainted, aliens, or the like.

Ludlow, Russel, and Cross, contra. This, if it is an objection, is only to the caption of the indictment, and if the caption be defective, the Court of King's Bench will send it down again to the Great Sessions to be amended. And they cited 1 Chitty, C. L., p. 333, where it is stated, that the names of the grand jurors need not be set forth in the caption, and that it is the practice of the Crown Office to omit them.

Campbell, in reply, cited the case of Rex v. Fearnley, 1 T. R. 316, and contended, that the caption of an indictment might be demurred to, and cer-

tainly could not be amended after verdict.

Park, J. As the caption may be amended if it be wrong, I shall not stop the case on such an objection.

Verdict—Guilty.

Campbell, and Maule, for the prosecution. Ludlow, Russel, and Cross, for the defendants.

[Attornies-Stokes, and Griffiths.]

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J8

In Banc.

Maule moved, that the attendance of the defendants to receive the judgment of the Court might be dispensed *with, on the ground of their extreme poverty, they being all laborers, and residing more than 180 miles from London; their attorney undertaking to pay any fine that might be imposed on them.

The Court granted a rule to show cause.

REX v. THOMAS et al.

If an indictment state that an issue was joined at the "General Sessions" of our Lord the King, holden for the county of G., before his Majesty's Justices of the Court of Great Sessions: this will not be proved by showing that such an issue was joined at the Great

Sessions of that county. And if it is laid, that the issue was joined in an ejectment, in which "John Doe, on the demise of W. R., and D. T., was the plaintiff;" and it appears that John Doe was plaintiff on the joint demise, and also in two several demises of the same lessors, this will be a fatal variance; as this is a description of how he was plaintiff, and not an allegation only.

INDICTMENT for a conspiracy to procure false witnesses on the trial of an

ejectment at the Great Sessions for the county of Glamorgan.

The first eight counts of the indictment stated, that, "at Cardiff, in the county of Glamorgan, at the General Sessions of our Sovereign Lord the King, then and there holden for the said county, before William Wingfield and Robert Mathew Casberd, Esquires, his Majesty's Justices of the Court of Great Sessions, a certain issue, before then duly joined in a certain action, to wit, an action of trespass and ejectment, brought, and then depending in the said Court of Great Sessions; in which said action John Doe, on the demise of William Rees and David Terry, was the plaintiff, and Robert Thomas and Thomas Bevan were defendants, came on to be tried," &c.: and charged the defendants with conspiring to pervert the course of justice, and produce false witnesses on that trial. The object of the conspiracy was variously laid in the different counts, and many overt acts were stated. The ninth count stated the trial of the ejectment to be in the Court of Great Sessions, but stated the demise in the same way in which it was stated in the other counts.

*Taunton, Campbell, Cross, and Maule, objected to the first eight counts, on the ground that calling the Court of Great Sessions the General Sessions was wrong—it should have been Great Sessions; for that the statute of 34 Hen. 8, c. 26, appoints Great Sessions to be held, and directs them to be called "the King's Great Sessions in Wales:" and, in fact, they never are called General Sessions. As to the ninth count, they objected, that the issue was stated to have been joined in an action of ejectment in which John Doe, on the demise of William Rees and David Terry, was the plaintiff: now this purported to be a single joint demise, whereas, in fact, the issue was on a joint and two several demises of Rees and Terry. This, they contended,

was a fatal variance.

Ludlow, Russell, and Ryan, contra. There is no uncertainty in the description of the Court; and though the Parliamentary title of the Court is not used, yet, from its being said to be held before William Wing field and R. M. Casberd, Esquires, his Majesty's Justices of his Court of Great Sessions, it can mean no other Court; and in the very act cited, this Court is called (in § 5) by the name of Sessions only. And as to the way in which the issue was alleged to have been joined, there was a case of a bill in Chancery being stated to be before the Right Hon. Lord Henley, and it was, when produced, a bill before Sir Robert Henley, Knt., and it was held no variance: and, in another case, an indictment for perjury stated a trial to have been before one Judge, and the record, when produced, stated, (as usual in records of trials at assizes,) that it was before the Judges, and it was held to be no variance: and in the recent case of Rex v. Powell, the indictment alleged, that there was a bill in Chancery against three persons, who were named, and it was, when produced, a bill against those three and a fourth, and it was held to be no That was a stronger case than the present: as here a joint demise variance. is alleged, which is true, though there *were other demises. And they cited Mountstephen v. Brooke, 1 B. & A. 224.

Taunton, in reply. The distinction is between matter of allegation and matter of description; the cases cited were cases of allegation, where it is sufficient to state what is true and can be proved, though something more is true also; but, in matters of description, the thing must be proved as it is described. And he cited Green v. Rennet, 1 Phil. L. Ev. 214. That a bill was filed against two or three persons is matter of allegation; but here they describe the way in which John Doe is plaintiff. If they had alleged John Doe

to be plaintiff, that would have been proved by showing him plaintiff on a demise; but if they undertake to describe how he is plaintiff, they must do it

correctly.

PARK, J. I am clearly of opinion that the first objection is fatal to the first eight counts. The act of Parliament gives this court a certain name. The description here is uncertain; for how can we know whether the indictment was found at a Court called the General Sessions or at the Great Sessions. As to the second objection: The question is, whether it is matter of allegation or of description. Nothing is more important than to describe correctly. Here they state that John Doe was plaintiff on a joint demise of two persons; they undertake to describe how he was plaintiff; this is, therefore, not matter of allegation, but of description. The defendants must, therefore, be acquitted. Verdict—Not Guilty.

Ludlow, Russel, and Ryan, for the prosecution.

Taunton, Campbell, Cross, and Maule, for the defendants.

[Attornies-Stokes, and Deere & Cooke.]

*BROMAGE et al. v. PROSSER.

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Semble, that malice is necessary to ground an action for words; and that if words be proved to be spoken bona fide, and without malice, no action lies for the speaking of them, though they be false and actionable in themselves; and though injury result to the party from the speaking of them: and, semble, that the defendant may, under the general issue, go into evidence to show that he spoke the words bona fide and without malice.

SLANDER of the plaintiffs in their business as bankers, by the defendant saying, that he had just heard that Bromage and Sneyd's bank, at Brecon, had stopped payment, and that he must ride over to Brecon to try to get his money on some of their notes that he held. It was laid as special damage, that he

had injured the circulation of their notes. Plea—General issue.

The evidence on the part of the plaintiffs proved, that the defendant had spoken the words, and that just afterwards there was a considerable run on the plaintiffs' bank. And for the defendant it appeared, that he was a holder of the notes of this bank, and that he really had been told that the bank had stopped payment, and that he actually rode from his residence at Crickhowel to Brecon to get cash for the notes he held; but that, when he got to the bank, and was told that they had not stopped payment, nor even had had a run on them, he said he would keep the notes, as they were as good to him as the money: and it further appeared, that, on his return to Crickhowel, he told the witness to whom he had spoken the words on which the action was brought, that the story of the Brecon bank having stopped payment was all false; for that he had been to Brecon, and found them going on with business the same as usual.

Campbell, for the plaintiffs, had objected to the evidence of these farts as inadmissible, as no justification of any kind had been put on the record.

PARK, J., was of opinion, that the evidence was admissible, to prove that the

words were not maliciously spoken.

*Taunton, for the defendant, contended, that if the jury were satisfied that the defendant spoke the words bona fide, and without malice, he would be entitled to a verdict, though the words might be untrue, and damage

might ensue from the speaking of them; and that, to support the action, they

must have been spoken maliciously.

Campbell, contra. All words spoken of another to the injury of his reputation, being untrue, must be taken to be maliciously spoken; and are actionable, unless the communication be of a privileged nature, as made to a man's attorney, or counsel, or the like.

PARK, J. To support an action for words, malice is essential; but malice may be presumed by the jury, either from their being false, from the nature of the words themselves, from the manner of the speaking of them, or from other evidence; but then the absence of malice may be shown on the other side: and if it were not competent to the jury to consider of the question of malice or no malice, and for the defendant to show that he was not actuated by any malice, the communications of society must be at an end. I shall leave the facts to the jury, and leave it to them to say, whether, after what has been proved on the part of the defendant, they are not satisfied that the defendant spoke the words bona fide, and without malice; for malice, express or implied, being one of the ingredients of the action, the defendant may have the advantage of this defence on the general issue.

Campbell, for the plaintiff.—Taunton, and Maule, for the defendant.

[Attornies—Bold & V., and Powell & Co.]

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*COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J&.

In Banc.

Campbell moved for a rule nisi, for a new trial, on two grounds. 1st. Because the evidence of the defendant having previously heard statements from others, similar to those he made, ought not to have been received. And 2d. For misdirection of the learned Judge. And he contended, that, if actionable words were spoken without there being any reason to induce the speaking of them, and without the communication being of a privileged nature, that the party injured would be entitled to a compensation, though no actual malice appeared in the defendant.

The Court granted a rule nisi.

MONMOUTH ASSIZES.

TRIPP, Gent., one, &c., v. THOMAS.

Words.—If the defendant, in an action for words spoken of an attorney, let judgment go by default; and on the execution of the writ of inquiry, neither plaintiff nor defendant goes into any evidence of any kind, the jury are entitled to give such moderate damages as they think ought to be paid for the speaking of an attorney the words laid in the declaration.

Action for words spoken of the plaintiff as an attorney, imputing to him that he had caused false witnesses to be produced on the trial of a cause.

The defendant had suffered judgment to go by default; and when the jury

were impanelled before the Under-Sheriff, under a writ of inquiry, the plaintiff's Counsel addressed the jury, but did not call any witnesses, nor *adduce any evidence of any kind. The defendant's Counsel also addressed the jury, but called no witnesses. The Under-Sheriff read the whole of the declaration to the jury, and told them to give such damages as they thought right for the injury done to the plaintiff by the speaking of these words.

The jury found a verdict for plaintiff—Damages, 40l.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Ludlow now moved to set aside the inquisition, on the ground, that, as no evidence had been adduced before the jury, they were only justified in giving nominal damages, the judgment by default admitting some damages to be due, but admitting no certain amount above a farthing.

ABBOTT, C. J. The judgment by default admits the speaking of the words as laid in the declaration, and that the plaintiff was an attorney is also alleged; and the jury had a right to give damages for such speaking, without any further evidence than the defendant admitting the fact by letting the judgment go by default. The jury do not appear to have given vindictive damages; and I think we should do wrong to disturb their verdict.

The other Judges concurred.

Rule refused.

*GLOUCESTER ASSIZES.

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(Crown Side.)

BEFORE MR. JUSTICE LITTLEDALE.

REX v. JAMES GARDNER.

It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not.

Indictment for robbery.

The prosecutor proved that the prisoner obtained his money by threatening to accuse him of an unnatural crime.

The prisoner's defence was, that the prosecutor had made an attempt to commit such a crime, and had voluntarily given him the money not to prosecute him for it.

LITTLEDALE, J., ruled, that it was equally a robbery to obtain a man's money by intimidating him with a threat of an accusation of an infamous crime, whether the prosecutor were really guilty of the crime or not; as, if he was guilty, the prisoner ought to have prosecuted him for it, and not have extorted money from him: but, if the money was given voluntarily, and without any previous threat, the indictment could not be supported.

Twiss, for the prosecution.

Justice, for the prisoner.

Verdict—Not Guilty.

[Attornies—Newman, and ———.

COURT OF KING'S BENCH.

(Michaelmas Term, 1824.)

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

LANG v. ANDERDON.

See ante, p. 171. The rule nisi for a new trial now came on to be argued. The Attorney General, Gurney, and Kaye, showed cause. The question is, was the sailing in this case a sailing from Demerara within the policy? If it had been warranted to sail only, there could have been no question, and the word "from" can make no real difference. It has been settled, that a warranty to sail is complied with by the vessel bona fide breaking ground, though she does not clear the port. This was a small vessel, and took in her whole cargo at the town; and got away from the town and port, and had got two miles and a half on her voyage, even out of the river, when the pilot thought that she could not get over some shoals about ten miles further on. objection is, that she had not at that time complied with the warranty to sail from Demerara, because she had not passed these shoals, on the outside of which large vessels take in their cargoes; and this being a warranty to sail from Demerara, it is not fulfilled unless the ship has passed these shoals, which are contended to be at Demerara. Lord Chief Justice Gibbs, in his judgment in the case of Moir v. The Royal Exchange Assurance Company, 6 Taunt. 241, lays down, that where *there is a warranty "to sail" on or before such a day, when the ship breaks ground, and gets under weigh, the warranty is complied with. There, the ship had not got out of the port; but this ship had left the town and the river, and had got into open sea; and the only reason for her not proceeding, was, the danger arising from shoals ten miles further on the voyage. The argument on the other side is, that as large ships do not pass the shoals, the port of Demerara extends to them. If a vessel had gone outward-bound from London to Demerara, and had moored twenty-four hours outside them, and had even taken out some part of her cargo there, could it be contended that this was a completion of the voyage? and that would be the converse of the present case. There is no evidence that, outside the shoals, any port dues are payable. The question, whether the vessel had left Demerara, was a question for the jury, and that question they have decided

Scarlett, Campbell, and F. Pollock, contra. This ship was to sail from

Demerara; and a great deal has been said about the town and the river. Now the name of the town is George-town, and Demerara is the province. Now it is contended, that the port did not extend to the place where this ship was, because it was beyond the mouth of the river; but if that were so, no large ship ever comes within the port. The case of an outward-bound ship has been put, but that is not at all analogous; because, if a ship discharges at two or more ports, the final port is the port of discharge.—Suppose the policy at and from Jamaica warranted to sail on or before July 25; if the ship had, bona side, commenced her voyage, it would be a compliance with the warranty; but if it was a warranty to sail from Jamaica, this clearly would not be complied with by her sailing from port to port in that island before the day: and in a great many places, vessels *of any burden can never get within three miles of the shore. When the words are "to sail from," they must be taken to mean a leaving of all places where ships ever load; and, in fact, the place where this ship came to anchor was as much a part of Demerara as any other place in or out of the river. It may be said, that where the ship received her cargo was the place meant as Demerara in the policy; but then the policy is "on ship or ships:" and if the party had two ships, one of one hundred tons, and the other of four hundred tons, the one would take in her cargo in the river, and the other would take in her's on the outside of the shoals; and if the small one sailed to a place, a mile short of the place where the large one lay, the former would have sailed from Demerara, and the latter would be still at Demerara. The best course for commerce is, to have instruments expounded by certain general rules of construction, and not to let the construction in each particular case go on the particular facts of that case. And they cited Moir v. The Royal Exchange Assurance Company; and contended, that the words. "to sail from" a place, were equivalent to the words "to depart," which were used in the policy in that case. The question is, What is Demerara? it is clear, that the places to which all ships, both large and small, go, constitute but one port of Demerara; and the very reason of the warranty is, that the ship shall have passed certain dangerous places, before a particular time of the year. But if the warranty is complied with in this case, the ship might have stayed at the place where she cast anchor for an indefinite time, and yet have the full benefit of the policy.

ABBOTT, C. J. The Court will take time to consider of this case before they

deliver their judgment.

It has been long settled, that if a ship breaks ground, bona fide, to proceed on her voyage, with her cargo and clearances on board, it is a compliance with a warranty to sail on or before a particular *day; and this is so, though the assurance may be at and from a whole island, (as at and from Jamaica;) and the ship hay be only proceeding from one part to another in that island, to join convey or the like. Bond v. Nett. Cown. from one port to another in that island, to join convoy or the like. Bond v. Nutt. Cowp. 601; Thelluson v. Ferguson, Dougl. 361; Wright v. Shiffner, 11 East, 515. But in the case of Ridsdale v. Neunham, 3 M. & S. 456, a freight and goods were insured "at and from Portneuf to London, warranted to sail on or before October 28." The ship was loaded at Portneuf, which is thirty miles up the river St. Lawrence, and on the 26th of October dropped down the river to Quebec, with an incomplete crew; and at Quebec completed the crew, and obtained a clearance, and sailed from Quebec on the 30th. Held, that the dropping down from Patternf did not satisfy the warranty casil for that to sail. the dropping down from Portneuf did not satisfy the warranty to sail; for that, to sail, means to sail on her voyage, that is, with her clearances, and equipt for the voyage. But, in Moir v. The Royal Exchange Assurance Company, the Court held, that a ship breaking ground to proceed on her voyage, but not getting out of port, is not a compliance with a warranty "to depart" on or before a particular day.

GARRETT v. HANDLEY.

If a plaintiff has been applied to, to lend money to A., and the plaintiff requests a firm, of which he is a member, to do so, and they advance the money, debiting A. in their books: the plaintiff cannot maintain an action against a third person, who has guarantied the re-payment of the money to be advanced to A. by the plaintiff.

SEE ante, p. 217. The rule nisi for a new trial coming on to be argued,

the Court called on the plaintiff's counsel to support the rule.

The Attorney-General, and Campbell. This rule was moved for on two grounds. 1st. Because it appeared at the trial that the plaintiff was a partner in the Bank of Messrs. Bodenham & Co., at Hereford, and that the money was advanced by that firm to Gibbons; and though it was advanced by them at the instance of the plaintiff, yet, as Gibbons, and not the plaintiff, was debited in their books, they, and not the plaintiff, should have brought the Now, as the money was advanced by Bodenham & Co., at the instance of the plaintiff, he was, in point of law, debtor to them, and, therefore, the defendant *is liable to him for the amount: and it has been held, that if a written agreement is made with one person only, for the benefit of more, that person may bring an action on it. As to the 2d point: That it was incumbent on the plaintiff to prove that the defendant had not made provision for the re-payment of the money—The onus certainly must lie on the defendant, to show what provision he had made, as the plaintiff could know nothing on the subject; and, after the lapse of so much time, (the guaranty having been given in the year 1818,) the question, whether the defendant had made provision, should have gone to the jury.

BAYLEY, J. You might have gone to the defendant, and have asked him

what provision he had made.

Jervis, and Tindal, contra, were stopped by the Court.

ABBOTT, C. J. My learned Brothers think, that, on the first point, the nonsuit was clearly right. The letter of the defendant is to the plaintiff alone, and takes no notice of his partners: and if the plaintiff had borrowed the money of his partners, and then advanced it to Gibbons, this action would have been rightly brought; but Gibbons is made debtor to the firm for this money, and the plaintiff is not. The Court must, therefore, discharge the rule.

BAYLEY, J. It was an essential part of the allegation of this declaration that the plaintiff advanced the money, whereas the proof is that the firm did so.

Holroyd, and Littledale, Js., concurred.

Rule discharged.

In an action on a contract, if there be any party who ought to have joined in the action *485] who has not, it is a ground of nonemit; but in actions *in form ex delicto, the omission of a person who should have joined as a plaintiff, is no ground of nonemit. And, where a person is held out to the world to be a partner in a trade, he must join in an action on a contract with the firm, unless, at the trial, distinct evidence is given that he has no interest in the matter; and, then, the action will be maintainable, though he is not joined in the bringing of it. Teed v. Elworthy, 14 East, 210. This is very important; as it frequently happens that a person so held out as a partner is a most material witness for the firm he is thus connected with. In the case of Lloyd v. Archbowle, 2 Taunt. 524, it was held, that it was no ground of nonsuit that a dormant partner, who took a share of the profit of the contract, but was not privy to the making of it, had not joined in bringing the action. And in the case of Mawana v. Gillett, 2 Taunt. 325 (n), where the plaintiff had entered into a contract with the defendant, and had, afterwards, let other persons have shares could not have joined in the action for breach of the contract; and that, therefore, one of them was a competent witness to prove the original contract between the plaintiff and the defendant. And in Lucas and Others v. De La Cour, 1 M. & S. 249, where one of several partners made a contract, and at the time declared the subject matter to be the property of himself alone; it was held, that this declaration was evidence against all the partners, and that they could not sue on the contract.

CUXON et al., Assignees of SWEET, v. CHADLEY

SEE ante, p. 174. The rule nisi for entering a verdict for the defendant

now came on to be argued.

Marryatt showed cause. I submit that the Lord Chief Justice's direction was perfectly right. The question is, whether, by this arrangement, the debt due from the defendant, James Chadley, was put an end to. I contend, that, to extinguish the debt, Sweet should have given some written discharge to the defendant, and for that discharge there should have been some consideration: but here, no receipt of any kind was given. As there was no "writing, what is to compel Robert Chadley to answer for the debt of his brother? [*486 for that is the effect of this arrangement. Without some undertaking in writing he certainly would not be bound. This case is not so strong as the case of Wyatt v. The Marquis of Hertford, 3 East, 147;† as, there, the plaintiff had a written security from the steward, and, therefore, had a remedy against him: but Sweet could never have any right of action against Robert Chadley, as there was no writing; and as this was a paying by him of the debt of another.

BAYLEY, J. There you are quite wrong, Mr. Marryatt; for there are many cases which decide, that a man, by word only, may take a debt upon himself, discharging the principal debtor. In this case, Robert owes James money; and, by this arrangement, Robert is to pay Sweet what he would

otherwise pay to his brother.

Marryatt. There was no evidence at the trial that Sweet knew that one of the brothers owed the other money; all that came to his knowledge was, that Robert Chadley desired him to place James's account to his, and that he

consented to do so.

Gurney, contra. The case stands thus: Robert *Chadley owes money to James; and the two agree with Sweet, that Robert should pay a sum to Sweet in discharge of James; and, in pursuance of this, Robert is debited to the amount in Sweet's books. Under this arrangement, the parties went on till after the bankruptcy of two of them; I therefore submit, that this was a perfectly legal bargain, and, therefore, that the assignees of Sweet cannot now recover against this defendant.

ABBOTT, C. J. We shall consider of this case before we give our judgment.

† In that case, the plaintiff had done certain work for the defendant: the Marquis's steward had given him his own draft in payment, and the plaintiff gave a receipt for it as money. The draft was disbonored, and the steward gave the plaintiff another draft, which was also disbonored. This action was therefore brought against the Marquis: on whose part it was contended, that the plaintiff, by taking two of the steward's drafts successively, had accepted his security for the money, and, therefore, could not charge the defendant. But the Court held the defendant still liable for the work done, unless be could show "that he was in any way prejudiced by the steward's having given his own security to the plaintiff, and taken the latter's receipt."

GILL v. CUBITTS.

SEE ante, p. 163. The rule nisi for a new trial in this case came on to be

argued.

Scarlett, and Parke, showed cause, and contended, that a party sung on a bill of exchange, which had been stolen, ought to show that he had obtained the bill under circumstances clear of all suspicion; and it was not at all a new

principle, that, if a party received a stolen bill of exchange under circumstances that were calculated to excite his suspicion, he could not maintain an action on such bill; for, in a case a few years since at Lancaster, tried before Mr. Justice Holroyd, in which the party sued on a bill of exchange that had been lost, that learned Judge left it to the jury to say, whether the party had used due caution in taking it, and the jury were of opinion that he had not. Here, the plaintiff's clerk did not take the numbers of the notes which he gave for it; and he said, that he at all times discounted bills, having any respectable acceptance, without making any inquiry as to the person *that brought them. The rule is, that every person suing on a stolen note or bill is bound to show that he gave value for it in a fair way; and if the rule were otherwise, any person who had discounted a stolen bill might recover on it, though he had previously held out every temptation to persons to bring stolen bills to him for him to dis-

Gurney, and F. Pollock, contra, after citing the case of Lawson v. Weston, 4 Esp. 56, contended, that if there was a difference between that case and the present, it was in favor of the plaintiff; because the plaintiff's clerk not only acted bona fide, but thought that he knew the features of the person who brought the bill to be discounted. The proper question to be considered is— Did the party act bona fide in taking the bill? If we were to consider it on the question of carelessness, it would be against the defendant, for he might have saved the whole loss by indorsing the bill specially; and his sending a bill by a coach, with a general indorsement on it, was a greater want of care, than a person afterwards discounting the bill in the way of his business. His Lordship spoke of a board being posted up, inviting suspicious persons; which was putting the case very strongly: for, instead of that, the case was that of a respectable clerk, acting bona fide, being once deceived by discounting a bill, brought by a man whose person he thought he knew before. In the case tried at Lancaster, the party had not acted bona fide; but where a person has acted bona fide, and given a full consideration for a bill, no case has yet decided, that mere want of caution on his part is a bar to his recovering. It is of the greatest importance, that, in a great commercial country, the circulation of bills should be most free. The Court can know little of the manner in which mercantile business is transacted. Bill-brokers continually discount for persons they do not know, provided they consider the names on the bill *sufficient to secure its payment at maturity: and if it were permitted to be a defence, that the party had not used sufficient caution when he took a bill, it would completely paralyze the circulation of negotiable securities.

ABBOTT, C. J. If, upon a re-consideration of this case, I could think that the jury could have come to a different conclusion, I should be most anxious for the case to go down to another jury; but I think that the jury could not come to any other conclusion. There is, certainly, a great difference between this case and the cited case, though I think that if Lord Kenyon could have anticipated the consequences of his ruling, he would not have decided as he did. The practice of robbing stage-coaches of securities for money has been most frequent; and, personally, I cannot help thinking that this practice has been much increased by the facility with which the stolen securities are disposed of. I should be grieved if commerce could be injured by the decision this Court has to pronounce; but I think that the true interests of commerce will be assisted by persons using due caution: and the sooner it is known that the authority of the case of Lawson v. Weston is at least doubted by this Court the better. I certainly wish that its authority had been doubted sooner; and I must say, that the practice of this bill-broker's office is highly inconvenient, as

It goes directly to encourage robbery and fraud.

BAYLEY, J. I agree with Mr. Gurney that the Lord Chief Justice, observing on the effect of a board being posted up, having the words-"bills, having respectable names on them, brought by persons whose features are known,

discounted here, without any inquiry as to the bringer," was putting the case strongly; but the practice of the plaintiff's office completely warranted it: for the plaintiff's clerk knew nothing of the bringer, does not ask him a single question as to who he was, or how he came *by the bill; and his Lordship, most properly, in my opinion, left it to the jury to say, whether due caution had been used in the taking of the bill. It has been argued, that the question should have been, Was the bill taken bona fide, and for value? but I consider it a part of bona fides to ask all proper questions. On referring to the cases, it will be found, that this point was, in substance, left to the jury-In the case of Miller v. Race, (1 Burr. 452,) Lord Mansfield lays a stress on the circumstance of the stolen note having been taken "for a full and valuable consideration, in the usual course of business;" and in the case of Grant v. Vaughan, (3 Burr. 1516,) Mr. Justice Wilmot observes on the plaintiff there having taken the note fairly and bona fide, in the course of trade, and with caution: so that, in that case, his Lordship uses the very term "caution." And in the case of Peacock v. Rhodes, (Dougl. 632,) Lord Mansfield lays down, that the question of mala fides was a question for the jury; and he mentions different grounds of suspicion as fit matters for their consideration. It is important for the interests of trade that it should be known, that, if a man takes a bill of a person, whose name he does not know, and whom he does not know where to find, without asking any questions, he is not acting with such sufficient caution as to entitle him to maintain an action on the bill, in case it had been stolen.

HOLROYD, J. If the party took this bill under circumstances of suspicion, merely because there is the name of a good acceptor on it, I think he is not entitled to recover. I certainly cannot agree with the doctrine laid down in the case of Lawson v. Weston. I also think that the jury are the proper tribunal to consider whether the party acted with fair caution or not; and I think that in this case they have came to a proper conclusion.

Rule discharged.

*GRAY et al. v. COX et al.

[#49]

SEE ante, p. 194. The rule nisi for a new trial in this case came on to be

argued.

Scarlett showed cause. If a person sells goods for a particular purpose, at a known price, the Law raises an implied warranty that the goods shall be reasonably fit for that purpose; and, in fact, the copper sold by the defendants to the plaintiffs was wholly unfit for sheathing. Mr. Gurney argued that his clients were only merchants, and sold what they bought; but I contend, that if they sold an article as sheathing copper, which was not so, they must be liable in damages: for every party selling goods by a particular description impliedly warrants them to be of that description. If a man buys as a coach horse a horse that is not so, and sells it again as a coach horse, would it be any defence to him to say, I bought it as a coach horse; and, because I so bought it, you have no remedy against me? And he cited the cases of Laing v. Fidgeon, 6 Taunt. 108: and Gardner v. Gray, 4 Camp. 144.

J. L. Adolphus, on the same side, was stopped by the Court, who called on Gurney, in support of the rule: who cited Stuart v. Wilkins, Doug. 18; and Parkinson v. Lee, 2 East, 314; and argued, that every sheet of the copper was stamped with the words, "The Mines Royal Copper Company," which told every buyer from what place the copper came; and if the plaintiffs wished to have a security that the copper should last a certain number of voyages, they

might have had an express warranty for that purpose. It appeared that the copper in question was a part of a much larger *quantity, and that there had been no complaint of any part of the residue of it.

Campbell, on the same side. The declaration avers, that the copper should be of a sound, merchantable, and serviceable quality. Now, how is this supported? The copper in question was at no time described as possessing these qualities, and there was no express warranty of any kind. Therefore, the warranty (if any) was implied. The defendants have a warehouse at which they sell their goods; the plaintiffs come there, and order goods, having an opportunity to inspect them; and, no fraud being alleged, the question is, whether the vendors gave an implied warranty against latent defects? The rule has always been caveat emptor. Mr. Scarlett has relied on the case of Laing v. Fidgeon; but that case is distinguishable from the present; as in that case there was no opportunity of inspecting the goods: and in no case has it ever been decided, that a defendant was liable, where there had been an opportunity of inspecting the goods.

BAYLEY, J. In the present case there was a fixed price; and I would ask

what opportunity the plaintiffs had of inspecting the goods?

Campbell. The shipwright who put on the copper was the agent of the plaintiffs; and he made no objection.

ABBOTT, C. J. But, at the trial, the shipwright stated that it was no part of

his business to examine the copper.

Campbell. This being a latent defect, of which both parties were equally ignorant, the purchasers should have guarded themselves by an express warranty that the copper was good for a particular purpose; and there is *no implied warranty against latent defects, where there is no fraud.

LITTLEDALE, J. In the case of Chandeler v. Lopus, Cro. Jac. 4, the Court held, that where a jeweller sold a stone, which he affirmed to be a bezars stone, which, in fact, was not so, yet no action could be maintained against him, because he did not warrant it to be a bezars stone. But that case goes much too far.

In the case of Bridge v. Wain, 1 Stark. 504, Lord Ellenborough says, that to satisfy an allegation that the goods were warranted to be of

any particular quality, proof must be given of such warranty.

ABBOTT, C. J. My opinion at the trial was, that the defendants having sold this as "sheathing copper," they must be taken impliedly to warrant it fit for that purpose. But whether the declaration on this case is supported by the evidence, requires further consideration. We therefore think it better that this case should be argued again by one gentleman on each side; and that that point, as well as my direction, may be considered, as at the trial I took a narrower view of the case than now.

In 1 Inst. 102 a, Lord Coke says, "Note, that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit, there be no express warranty; but the common law bindeth him not, unless there be a warranty either in deed or in law, for,

saveat emptor."

The case of Hern v. Nichols, 1 Salk. 289, was an action on the case against the defendant, a merchant, for selling to the plaintiff a quantity of silk of a particular sort, whereas it was silk not of that sort. There was no deceit in the defendant, but in his factor abroad; and the Court held the merchant civilly responsible for the deceit of his factor abroad; and the Court held the merchant civilly responsible for the decett of his factor. The case of Stuart v. Wilkins, Dougl. 18, merely decides, that for the breach of an express warranty, the plaintiff may declare in assumpsit. The case of Parkinson v. Lee, 2 East, 314, decides, that if a person buys a commodity, (in that case hops,) the law does not raise an implied warranty that the commodity should be of merchantable quality, though the full merchantable price was given: and, therefore, *if by the fraud of the grower of the hops there was a latent defect in them, by which, unknown to the defendant, they were rendered unmerchantable, no action was maintainable against the defendant; and Grose, J., said, "The mode of dealing is, that the plaintiff buys hops from the defendant, whom he knows is not the grower. If he doubts the goodness, or does not choose to incur any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties."

In the case of Loing v. Fidgeon, 6 Taunt, 108, where the defendant was to supply a quantity of saddles, the Court held, that, on every contract for the supply of manufactured goods, there is an implied term that the goods shall be of merchantable quality. It however appeared that the goods delivered did not correspond with the sample; but that circumstance was not observed on by the Court in giving judgment.

In Gardner v. Gray, 4 Camp. 144, the plaintiff had bought twelve bags of "waste silk;" and when they were delivered, they were of so inferior a quality as not to be saleable as waste silk: and Lord Ellenberough held, that the purchaser had a right to expect a saleable article, answering the description in the contract; and that, without any particular warranty, it is an implied term in every such contract. "Where there is no opportunity of inspecting the commodity, the rule of caveat emptor does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract."

In Bridge v. Wain, 1 Stark, 504, Lord Ellenborough ruled, that if goods were sold by

In Bridge v. Wain, 1 Stark, 504, Lord Ellenborough ruled, that if goods were sold by the name of "scarlet cuttings," and so described in the invoice, an undertaking that they were so must be inferred; but to satisfy an allegation that they were warranted to be of any particular quality, proof must be given of such a warranty: however, "a warranty is implied that they were that for which they were sold."

In addition to these cases, there is the case of Shepherd v. Kain, 5 B. & A. 240. There, a ship had been sold, which was described in the advertisement for the sale "as a copper-fastened vessel," but the advertisement also stated, "the vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatsoever." The ship was not, in fact, a copper-fastened vessel; and it appeared that the plaintiff, before he bought her, had a full opportunity to examine her situation. But the Court held, that the action well lay, and that the meaning of the advertisement must be, that the sellet would not be responsible for any faults a copper-fastened ship might have; and that the terms "with all faults" must mean with all faults which it may have consistently with height the thirst described. being the thing described.

*WALMISLEY *. ABBOT.

F#495

SEE ante, p. 309. This case came on to be argued before the Judges (who sat in pursuance of the King's warrant for that purpose) after Trinity term.

Whately showed cause. By the statute 55 Geo. 3, c. 194, s. 9, it is enacted, that the Court of Examiners of the Apothecaries' Company, or the major part of them, shall examine all persons desirous of practising as apothecaries, and grant them certificates of their having duly passed such examination. Section 14 of the same statute enacts, that, after the 1st day of August, 1815, no person who was not in practice before, shall practise as an apothecary, unless he has passed his examination, and has received his certificate: and s. 21 enacts, "That no apothecary shall be allowed to recover any charges claimed by him in any Court of Law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to, or on the said 1st day of August, 1815; or, that he has obtained his certificate, to practise as an apothecary, from the said Master, Wardens, and Society of Apothecaries, as aforesaid." No part of the act requires the certificate to be signed by the Court of Examiners; they are to grant the certificate: and if reasonable evidence is adduced that the certificate was granted by them, it would be sufficient. The certificate would have been good if they had not signed it; and it would be very hard w cast on the plaintiff the onus of proving the handwriting of several persons whose names were unnecessarily signed to the certificate. If the certificate were not genuine, the party must be guilty of a gross fraud, which the Court will not presume. And this case is distinguishable from the case of Moises v. Thornton, 8 T. R. *303.† There the plaintiff could not

[†] The case of Moises v. Thernton, 8 T. R. 303, was an action for words, the defendant having called the plaintiff a quack; and in the declaration it was averred, that the plaintiff was a physician, and had duly taken the degree of a Doctor of Physic. To prove this, s diploma, purporting to be granted by the University of St. Andrew's, in Scotland, was

prove the seal of the University of St. Andrew's, and could not prove that the

diploma granted to the plaintiff was genuine.

Taunion, in support of the rule. The certificate, to be good and valid, must be granted by a majority of the Court of Examiners: and, to show this, the plaintiff must prove that the names attached to it were the genuine signatures of the major part of the Court of Examiners, which he has not done. The case of Moises v. Thornton, was stronger than the present; as there a witness proved that he had seen the proper officers sign a certificate that such a diploma had been granted, and yet that was held to be not sufficient.

BAYLEY, J. That certificate was not the diploma, and the diploma itself

was not sufficiently authenticated.

Tounton. No more is this certificate, my Lord.

[ABBOTT, C. J., was absent.]

*497] *BAYLEY, J., (after alluding to the terms of the act of Parliament)—
I am of opinion, that, putting a fair and reasonable construction on the clauses of this act of Parliament, it was not incumbent on the plaintiff to prove the handwriting of all the signatures to the certificate, but only to show that it was the genuine certificate of the Court of Examiners, and issued by them; and of those facts I think sufficient evidence was given at the trial.

HOLEOYD and LITTLEDALE, Js., concurred.

Rule discharged.

For the report of the argument in this case I am indebted to the kindness of a friend; as, at the time this case was under the consideration of the Court, I was attending at the Old Bailey, to conduct the prosecution in the case of Captain M'Donagh.

VICE-CHANCELLOR'S COURT.

BEFORE SIR JOHN LEACH, KNT., V. C

JONES et al. v. CARRINGTON, Clerk.

On the trial of a modus, the receipts of a lessee of a deceased vicar are evidence; and if a witness proves that her father and brother were tenants of the tithes for above forty years, that is sufficient to let in their receipts, without proving a lease to them.

If a modus is leaid, in an issue directed out of the Court of Chancery, to extend over the

Ha modus is laid, in an issue directed out of the Court of Chancery, to extend over the whole of a parish, and the jury so find, the Court of Equity will not send the case down to a new trial, because it appeared at the former trial that a hamlet, in the tithes of which neither plaintiffs nor defendant claimed any interest, was a part of that parish, and was not covered by the modus.

and was not covered by the modus.

If, at the trial, an interested witness, who produced old documents, was allowed to give evidence of the place from which he brought them, thereby tending to establish their suthenticity, though he ought not to have been permitted to give such evidence, yet a Court of Equity will not send the case to a new trial, if there was evidence enough to support the verdict, exclusive of the documents he produced.

produced; and a witness proved, that he went into Scotland, and was told at that University, by the Rector and Professors, whom he attended at the public library, where they were assembled in their official capacities, that the diploma was granted by that University, and that the seal to it was the seal of the University; and the witness also saw the Professors sign a certificate, (which they gave him, and which was produced at the trial,) which stated, that the University had granted such a diploma to the plaintiff. Lord Kenven, at the trial, held, that this was not sufficient to authenticate the diploma; and the Court above confirmed that decision, and observed, that the plaintiff ought to have given some evidence that the seal affixed to the diploma was the seal of the University of St. Asserver's.

was a correct one, and as the point raised was a surprise on the plaintiffs, and calculated to defeat the justice of the case, he should refuse the motion, with some

COUR1 OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

MONTAGUE v. ESPINASSE, Esq.

a hasband is not liable for goods supplied to his wife while she is living with him, unless such goods are supplied under his authority or by his assent; and a plaintiff, to support an action against the husband, must give some proof of assent on the part of the husband. If a husband put away his wife without reasonable cause, he is bound to pay debts see may contract for necessaries; and if she is living with him, and he will not supply her with necessaries, though her proper remedy is in the Spiritual Court, yet it might be held, that the husband was liable for the amount of necessaries supplied to her. But if she is supplied with necessaries by her husband, he is not liable on any contract made by her, even for necessaries, unless there be evidence that she was authorized by him, and acted with his assent.

SEE ante, p. 356. The rule nisi granted in this case now came on to be

argued.

Platt showed cause; and contended, that the case had been properly left to the jury, who could not be said to have come to a wrong conclusion. It was left to the jury to say, whether these goods were supplied to Mrs. Espinasse with the assent of her husband, who was eminent in his profession, and living in a handsome house; and the plaintiff had a right to presume he was living according to his means; and if husband and wife are *living together, and the goods supplied are suitable to their degree, the assent of the husband may be presumed. It was said that there was no proof that Mrs. Espinasse ever wore any of these articles. But the question, whether they were suitable to her degree, was left to the jury, and they have found their verdict on that question: and ought the plaintiff to be called upon to prove that the defendant saw the goods worn by his wife, as that would be a fact only known in the family? And he cited Morton v. Withens, Skinn. 348.† In

† The case of Morton v. Withens, Skinn. 348, in which a Serjeant at Law was the defendant, was an action to recover the price of a quantity of silver fringe and lace, supplied to the defendant's wife for a petticoat and side-saddle, and were of the value of 94!. The defence was, that the defendant and his wife had had a dispute, and that she had said, that she would incur debts with a view to ruin him. Treby, C. J., left it to the jury to say, whether the plaintiff was privy to the wife's design to ruin her husband; and if not, whether the goods were suitable to the quality of the wife; for, if they were, the plaintiff was entitled to recover. In the case of Etherington v. Parrott, 2 Ld. Raym. 1006, Lord Holt says, "If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her; but if she runs away from him, he shall not be liable to any of her contracts; for it is the cohabitation that is an evidence of the husband's assent to contracts made by his wife for necessaries: but if the husband has solemnly declared his dissent that she shall not be trusted, any person that has notice of this dissent, trusts her at his peril after: for the husband is only liable upon account of his own assent to the contracts of his wife; of which assent, cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such

that case, it did not *appear that the defendant ever saw the goods worn. There is not the slightest evidence to show that the plaintiff knew that the defendant disapproved of the supplying of the goods; and the Court will never order a nonsuit to be entered, unless they see that no verdict for the plaintiff could be given.

Scarlett, contra. The cited case appears to have gone a good deal on the ground of the defendant being a Serjeant at Law, which is not so here: but I take the law to be, that a wife may charge her husband for necessaries, but not for articles of jewellery, unless he assents, which assent may be presumed, from his seeing her wear them or the like. Now the evidence is, that none of the family ever saw any one of these articles; and that the plaintiff always wished to avoid communicating with the defendant; and the plaintiff must know, that, as a special pleader, the defendant ought not, and could not, fit out his wife with jewels at this most extravagant rate; and, therefore, he trusted her in confidence of her own means.

BAYLEY, J. I am of opinion, that in this case a nonsuit must be entered, as there was no evidence to charge the defendant. If a man put away his wife without reasonable cause, he is bound to pay such debts as she may contract for necessaries only; or if she is living with him, and he will not supply her with necessaries, though her remedy is properly in the Spiritual Court, yet, it might be held, that her husband was liable for necessaries supplied to her: but if she is living with her husband, and is supplied by him, he is not bound by any contract made by her even for necessaries, unless there be evidence that she was authorized by him, and acted with his assent. It appeared in this case, that the defendant was working hard at his profession, as a special pleader, and lid not keep a man servant, and was living in a ready-furnished house. Now, could it be supposed for a moment, that he could *authorize his wife to spend upwards of 801. in jewellery, in about six weeks? if the defendant had looked at their house, he must have seen that the furniture did not at all correspond with the jewels he was selling. It is the duty of every tradesman, when he trusts a lady with jewels to this amount, and unsuitable to her degree, to ask her husband whether he has given her any authority to order them: he might very easily say-"It is the rule of our house, before we execute an order to this amount, to refer to the lady's husband on the subject;" and it is his bounden duty to do so. In the case of Etherington v. Parrott, 2 Id. Ray. 1006, Lord Holt distinctly says, that a wife, living with her husband, cannot charge her husband by any contracts she makes, unless by his assent; and that rule has been acted upon ever since. I am clearly of opinion, that, in this case, there was no evidence to go to the jury of any assent on the part of the husband, and that, therefore, a nonsuit must be entered.

Holkoyd, J. I am clearly of opinion, that a husband can only be liable even for necessaries furnished to his wife, when the wife is not supplied by him; and, therefore, if a tradesman supplies her, without first ascertaining that she is not supplied by her husband, or that she has authority from her husband, such tradesman supplies the goods at his own risk. If she is supplied with necessaries by her husband, a tradesman can only recover for such goods as he supplied to her with her husband's assent; and, that the husband did assent, must be proved on the part of the plaintiff in every action founded on such a supply of goods. And to charge the husband, it is not enough that the wife

presumption. For the wife has no power originally to charge her husband, but is absolately under his power and government, and must be content with what he provides; and if he does not provide necessaries, her remedy is in the Spiritual Court. But here were sufficient necessaries provided, and also the husband had forbid any trusting her. And sotice to the defendant's servant, usually employed by him in his trade, was a good notice to his master, the plaintiff, and he cannot charge the defendant.' And his Lordship afterwards added, "If a wife takes up silks, and pawns them before they are made intoclothes, the husband shall not be liable for the silks, because they never came to his use entra, if they were made into clothes and worn by the wife, and then pawned by her.'

should have asserted, that she had her husband's authority; for, if a were, a wife might go to many tradesmen, and pretend that she had her husband's authority for the orders she gave, and any man might be utterly ruined in a

few days by the imprudence of his wife.

*Littledale, J. The rule is, that a husband cannot be charged on contracts made by his wife, unless his assent can be shown. In this case there was clearly no express assent; and the question therefore is, can any assent be implied from the circumstances of this case? In Com. Dig. it. *Raron & Feme (Q₁) (where the authorities are collected on this subject,) it is laid down, that if a wife buy necessary apparel for herself, the assent of the husband shall generally be intended; but these goods were not articles of apparel, but of ornament, and that of a most expensive kind. It was also contended, that these articles were suitable to the state and degree of the defendant; but they clearly were not wanted for the wife of a person in his profession and station in life, and were, in fact, never worn: and if a tradesman supplies goods to a wife, without previously having the assent of her husband, he does so at his own risk; and I certainly think, there was, in this case, no evidence of any assent on the part of Mr. *Espinasse*.

ABBOTT, C. J. I quite agree with the opinions delivered by my learned Brothers; and I sincerely hope, that our decision will introduce more care into the dealings of parties than at present there appears to be. Our decision will be sometimes beneficial to husbands, to fathers, and to friends; but it will be most often beneficial to those persons who have goods to sell; as it will make them more cautious of letting their goods go out of their hands, without knowing who is to pay for them: and the experience of Courts of Justice shows us, that persons, very frequently indeed, have sold their goods, without

the slightest chance of ever getting paid the price of them.

Rule absolute for entering a nonsuit.

*PARKINS et al. v. MORAVIA.

T*507

SEE ante, p. 876. The questions raised in this cause were, by consent, turned into a special case.

AUSTIN, Esq., v. WARD.

SEE ante, p. 370. The rule nisi for a new trial in this case now came on to be argued. The only point made, was, whether the acts of bankruptcy were or were not concerted? The point ruled by the Lord Chief Justice at the trial, was acquiesced in by both sides.

The court granted a new trial, on payment of costs.

JOSEPHS v. PEBRER.

A sale of shares in the Equitable Loan Bank Company is void.
Every company assuming to act as a body corporate, without the authority of an act of Parliament, or the King's charter; or having a great number of shares generally transferable, is an illegal company; and though persons may, before obtaining either the sanction of an act of Parliament or the King's charter. Legally associate themselves for the purpose of endeavoring to obtain such an act of Parliament, yet, if they issue out a number of such shares, the sale of them is illegal: and if a defendant has directed the plaintiff to buy such shares for him, and he does so, the plaintiff cannot maintain any action to recover the money he has so expended, as he was dealing in shares in an action to recover the money he has so expended, as he was dealing in shares in an illegal company.

SEE ante, p. 341. The rule nisi in this case for a nonsuit, or a new trial, now came on to be argued.

Marryatt showed cause. It was objected at the trial, that this was an

illegal company within the statute 6 Geo. 1, c. 18.

*BAYLEY, J. Is this a company by act of Parliament or by charter? *5087 Marryatt. Neither, my Lord. But we are not seeking to set up a contract for shares in it, but merely to recover back money laid out by us in the purchase of shares by order of the defendant. 'The case of The Birmingham Mill Company shows, that if a company does not tend to the common grievance of the King's subjects, it is not an illegal company.

BAYLEY, J. The Court thought, in that case, that the shares were not generally transferable, the holding of them being virtually restricted to persons

living in the neighborhood of Birmingham.

Marryatt. Lord Ellenborough, in the early part of his judgment in that case, says, that only companies which are dangerous and mischievous are meant; and it does not appear, in the present case, that this was a mischievous and illegal company. I submit, that the plaintiff would be entitled to recover, unless the plaintiff had laid out the money in the purchase of something made out to be clearly illegal, because the plaintiff seeks to recover money laid out by him at the defendant's own request; for the defendant directed the plaintiff to buy these shares, such as they were, and now the defendant will not repay him the money he paid for them. Now, even if these were shares in an illegal company, I should submit, that, as the defendant himself directed the purchase of them, he would still be liable to repay the plaintiff the amount he had expended for him. This was the point for a nonsuit. The first point, on which the new trial was applied for, was, that the bought note sent by the plaintiff to the defendant ought to have been stamped. I contend, that it did not require any stamp; for this action was not brought on the contract; and, *509] further, that this was not a minute *or memorandum of a contract within the meaning of the stamp act; but was merely an intimation by the agent to his principal of what he had done.

This note did not contain the contract between the parties, nor was it to be binding on either party, nor intended to be evidence of the

contract.

Marryatt then contended, on the question that the shares had been delivered too late, that, as they were bought "for the coming out" of the loan, the coming out must be taken to consist of many days; as so large a number of shares could not all be issued in one day, the number of shares in this loan being forty thousand.

ABBOTT, C. J. Must not all the shares come out on one day? If it were

otherwise, one person might sell his shares before another had got his.

Andrews, on the same side. I submit, that the defendant, to succeed in this case, must have given distinct evidence that this company was illegal within the statute 6 Geo. 1. Now, that he certainly has not done. This company is called "The Equitable Loan Bank Company," and, from its name, it is to be presumed to be what the law would encourage.

ABBOTT, C. J. But the company professes to have a capital of two millions, when, in fact, there was no such capital, and when a one-pound deposit was

all it possessed.

Gurney, in support of the rule. At the trial, we were not left in the dark as to what the company was; for it was stated by the plaintiff's Counsel to be the most benevolent company on earth, for the company were to lend money at the moderate rate of eight per cent., whereas the *pawnbrokers charged twenty. Now, as to the illegality of the company. They profess to have a capital of two millions, whereas they have only forty thousand pounds; and besides this, they have small shares to the number of forty thousand, all transferable to any one who chooses to buy them. This is quite enough to show, that this is one of those dreadful speculations which inflicted so great an injury in this country about a century ago, and which, if not checked, would do a similar injury now. If any company ever fell within the purview of the act of Parliament, this is it. Another very important circumstance is, that these shares were at the time non-existent, and, therefore, the money was laid out in

the purchase of what was really nothing. [He was then stopped by the Court, as was Chitty, who was to have argued on the same side.]

ABBOTT, C. J. I am clearly of opinion, that in this case a nonsuit must be entered. From the evidence it appears, that a number of persons associated themselves together to form a large company, called "The Equitable Loan Bank Company." On the evidence, the object of this company did not very distinctly appear; but it was admitted, on both sides, to be a company for the lending of money at a rate of interest higher than is allowed by law to be taken by any, except persons subject to the regulations respecting pawnbrokers. There is, in point of law, no objection to a company being formed prospectively, for the purpose of obtaining the authority of an act of Parliament, or of the King's charter, provided, that before they act as a company, they obtain one of those two sanctions: but if, as in this case, they issue certificates for 2 great number of small transferable shares, and provide, that the members of the company shall submit themselves to the regulations or by-laws made, or to be made, by certain directors, before any authority has been obtained by act of Parliament, or a charter from the Crown for that *purpose, then I am of opinion that they are an illegal company within the meaning of the statute 6 Geo. 1, c. 18: first, by pretending and assuming to act as a corporate body without legal authority; and, secondly, by issuing out a great number of small shares, generally transferable, to any person who chooses to buy them. I have, therefore, no doubt that this company is an illegal one: and that, being so, the dealing in these shares is unlawful, and that, therefore, all contracts respecting them are null and void. The traffic in shares of this kind must be highly injurious, as what is gained by one person must be lost by another; whereas, in commerce, every party may be a gainer.

BAYLEY, J.—It is clear, that this association was within the meaning of the statute 6 Geo. 1, c. 18. The wording of that statute is certainly not clear; but after reciting (s. 18) that persons had contrived dangerous and mischievous undertakings or projects, under false pretences of public good, and had presumed to open books for public subscriptions, and drawn in many unwary persons to subscribe therein, towards raising great sums of money; and that the undertakers or subscribers had presumed to act as if they were corporate bodies, and pretended to make their shares in stocks transferable or assignable, without any legal authority, either by act of Parliament or charter from the Crown; provides, that all such undertakings and attempts, and all other public undertakings or attempts, tending to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or great numbers of them, shall be deemed illegal and void. Now, in this case, it appears, that the individuals forming this company acted as a public company, and that they had small transferable shares; and though Mr. Marryatt appears to consider, that it has been decided

that a company having transferable shares is not illegal, yet I take the distinction to be, whether the shares are generally transferable (r not: for if the shares are generally *transferable, without restriction, to any one who is able to purchase them, then the company becomes illegal. And in the case of Rex v. Webb and Others, 14 East, 406, Lord Ellenborough considers, that if the Birmingham Flour Company had presumed to act as a body corporate, or if their shares had been generally transferable without restriction, that would have been an illegal company. But, in that case, the transfer of shares was much limited. No one person could have more than twenty shares of one pound each; and they could not transfer their shares to any person without the consent of the committee. There is also the case of Pratt v. Hutchinson, 15 East, 511, which was the case of a subscription for the building of houses near Greenwich, by means of which each of the subscribers was successively to have a house built for him at the society's expense, in an order to be determined by lot; but in that case, the subscribers were, of necessity, restricted to persons who were either living, or about to live in that neighborhood; and further, the shares could only be transferred to persons who consented to become parties to the original articles, and persons who were approved of at a meeting of the society. Now contrast these cases with the present. In this case, for some purpose that does not distinctly appear, forty thousand shares are created, and all of them are to be generally transferable to every body. The Legislature, by an act of Parliament, or the King, by his charter, might make this legal; but in this case, there has been neither act of Parliament nor charter. I am therefore of opinion, that this is contrary to the act of Parliament, and that the plaintiff, having lent himself to contravene the act of Parliament, cannot recover in this case.

HOLROYD, J. I am of the same opinion. As these shares were to be gene-

rally transferable, I think the plaintiff cannot recover in this case.

*LITTLEDALE, J. In my opinion, this case clearly falls within the statute 6 Geo. 1, c. 18. To bring a case within the operation of that statute, it must appear that the pretended company tends to the common grievance of a great number of the King's subjects; and the question is-Does not this company tend to that effect? In my opinion it certainly does; for all undertakings, having small transferable shares, especially if they assume to be by a corporation, are declared by the Legislature to be to the common grievance, and to be illegal. In the present case, this company do pretend to be a body corporate; for, before they obtain the authority of an act of Parliament, or the King's charter, the shareholders are to be governed by the regulations made by a committee; which is saying, in effect, that the forty thousand shareholders are to be a great corporation, this committee being the select body. In the next place, these shares are generally transferable, without any kind of limit or restriction; and, prima facie, this is an undertaking to the grievance of great numbers of the King's subjects. In all the cases, the transfer of shares had been limited in such a way as to make them not generally transferable: perhaps if it had been shown that the objects of this society were perfectly legal and good, the society might not have been illegal; but so far from that, the object of it, as far as the Court are informed, is to lend money at a rate of interest greater than is allowed by law to be taken by any persons who do not subject themselves to the regulations respecting pawnbrokers: so that this is, in fact, a company to lend money at usurious interest: and without every one of the forty thousand shareholders was to become a pawnbroker, and conform himself to the regulations established concerning persons so trading, this company is most clearly an illegal one. But, even if that were not so, as it is not shown that this company was established for a legal purpose, the plaintiff is certainly not entitled to recover in this action.

*Abbott, C. J. Though that point has not been argued at the bar, I am of opinion, (as at present advised,) that at common law the sale

of these shares would be illegal and void; as it is, in effect, a wagering whether an act of Parliament will pass to legalize them or not.

Rule absolute for entering a nonsuit.

The eighteenth section of the statute 6 Geo. 1, c. 18, commonly called the Bubble Act, recites, that "Whereas it is notorious, that several undertakings or projects of different kinds have, at some time or times since the four and twentieth day of Jame, one thousand seven hundred and eighteen, been publickly contrived and practised, or attempted to be practised, within the city of London, and other parts of this kingdom, as also in Ireland, and other his Majesty's dominions, which manifestly tend to the common grievance, prejudice, and inconvenience of great numbers of your Majesty's subjects in their trade or sommerce, and other their affairs; and the persons who contrive or attempt such danger-sum and mischigwas undertakings or projects, under false presence of mublic good. do ous and mischievous undertakings or projects, under false pretences of public good, do presume, according to their own devices and schemes, to open books for public subscrip-tions, and draw in many unwary persons to subscribe therein towards raising great sums of money, whereupon the subscribers or claimants under them do pay small proportions thereof, and such proportions in the whole do amount to very large sums; which dangerous and mischievous undertakings or projects do relate to several fisheries, and other affairs, wherein the trade, commerce, and welfare of your Majesty's subjects, or great numbers of them, are concerned or interested: And whereas in many cases the said undertakers or subscribers have, since the said four and twentieth day of Jame, one thousand seven hundred and eighteen, presumed to act as if they were corporate bodies, and have pretended to make their shares in stocks transferable or assignable, without any legal authority, either by act of Parliament, or by any charter from the Crown for so doing; and in some cases the undertakers or subscribers, since the said four and twentieth day of June, one thousand seven hundred and eighteen, have acted or pretended to act under some charter or charters formerly granted by the Crown for some particular or special purposes therein expressed, but have used or endeavored to use the same charters for raising *joint stocks, and for making transfers or assignments, or pretended transraising bioint stocks, and for making transfers or assignments, or pretended transfers or assignments for their own private lucre, which were never intended or
designed by the same charters respectively; and in some cases the undertakers or subscribers, since the said four and twentieth day of June, one thousand seven hundred and eighteen, have acted under some obsolete charter or charters, although the same became void or voidable by nonuser or abuser, or for want of making lawful elections, which were necessary for the continuance thereof; and many other unwarrantable practices (too many to enumerate) have been, and daily are and may hereafter be contrived, set on foot, or proceeded upon, to the ruin and destruction of many of your Majesty's good subjects, if a timely remedy be not provided: And whereas it is become absolutely necessary. That all public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of your Majesty's subjects in general, or great numbers of them, in their trade, commerce, or other lawful affairs, be effectually suppressed and restrained for the future, by suitable and adequate punishments for that purpose to be ascertained and established:

Now for suppressing such mischievous and dangerous undertakings and attempts, and preventing the like for the future, May it please your most excellent Majesty, at the humble suit of the said Lords spiritual and temporal, and Commons, in this present Parliament assembled, that it may be enacted; and be it enacted by authority of this present Parliament. That from and after the four and twentieth day of June, one thousand seven hundred and twenty, all and every the undertakings and attempts described. Se aforesaid. hundred and twenty, all and every the undertakings and attempts described, as aforesaid. and all other public undertakings and attempts, tending to the common grievance, projudice, and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever, for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock or stocks, the transferring or pretending to transfer or assign any share or shares in such stock or stocks, without legal authority, either by act of Parliament, or by any charter from the Crown, to warrant such acting as a body corporate, or to transfer such transferable atock or stocks, or to transfer shares therein, and all acting or pretending to act under any charter, formerly granted from the *Crown, for particular or special purposes therein expressed, by persons [*516 who do or shall use or endeavor to use the same charters, for raising a capital stock, or for making transfers or assignments, or pretended transfers or assignments of such stock, not intended or designed by such charter to be raised or transferred, and all acting or pretending to set under the set of the or pretending to act under any obsolete charter become void or voidable by nonuser of abuser, or for want of making lawful elections, which were necessary to continue the corporation thereby intended, shall, (as to all or any such acts, matters, and things as shall be acted, done, attempted, endeavored, or proceeded upon, after the said four and twestern the said four and th tieth day of June, one thousand seven hundred and twenty) for ever be deemed to be illegal and void, and shall not be practised of in any wise put in execution."

ATKINSON v. COLESWORTH.

SEE ante, p. 339. The rule for setting aside the nonsuit in this case now

came on to be argued.

Scarlett and Campbell showed cause; and contended, that the master had no prospective lien on the freight; and that there was no distinction between this case and that of an auctioneer or a factor. And they cited Smith v. Plummer, 1 B. & A. 375.

Gurney, and Chitty, in support of the rule, argued, that the master was subject to liabilities which an agent in general was not subject to, and therefore he ought not to be bound by the general law applicable to the cases of principal and agent. They relied, also, on the fact of the charter party being in this case made in the name of the master.

The Court were of opinion, that there was no solid distinction between this case and that of Smith v. Plummer, and therefore directed that the rule should be directed that the rule should

be discharged.

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CASES

AT

NISI PRIUS.

AT THE

SITTINGS AFTER MICHAELMAS TERM.

COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1824.

BEFORE LORD CHIEF JUSTICE ABBOTT

SKYRING, Administratrix of SKYRING, v. GREENWOOD et al.

The plaintiff being the representative of a deceased officer of artillery, of which corps the defendants were paymasters, they delivered to him an account current, in which they acknowledged themselves to have received from the year 1806 to the year 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806. Held that they could not in 1821 be permitted to say that this admission was by mistake, as in 1816 the Board of Ordnance had announced that by the true construction of the order of 1806, persons in the situation of the deceased, were not entitled to the benefit of it; this announcement of the Board never having been communicated to the deceased by the defendants till the year 1821.

Assumpsir for money had and received.

This action was brought by the plaintiff, who was the administratrix of Major Skyring, deceased, against the defendants, Messrs. Greenwood and Cox, the army agents, as paymasters of the Royal Artillery, to recover the arrears of pay due to the deceased, as an officer of artillery, up to the time of his death. The defence was a set off of the monies which had been allowed to the deceased by the defendants under a mistaken construction of a general order of the Board of Ordnance, of the date of August 28th, 1806, relative to an increase of pay to artillery officers.

The case came on upon admissions, from which the following facts appeared:

—The deceased was brigade major of *Gibraltar*, and was also a captain in the Royal Artillery, of which corps the defendants were paymasters. By a general order, signed by the secretary to the Board of Ordnance, dated *July* 28th, 1797, it was directed, by command of his Majesty, that the pay of subalterns

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of the Royal Artillery should be increased 1s. 1d. per day, provided they held no other commission; but this was not to affect the half-pay. By a like general order of the 28th of August, 1806, it was directed that from and after July 1st, 1806, the pay of majors of the Royal Artillery was to be increased 1s. 11d. per day, and that of captains holding the brevet rank of majors, 2s. It also increased the pay of the various other ranks in the Artillery; but this order stated, that this increase of pay was to be under the same restrictions as the increase mentioned in the former order, and was not to extend to persons hold ing two commissions, or to the half-pay. This increase of pay was, in fact, allowed to all officers circumstanced as the deceased was, it being considered that a situation like that of brigade major of Gibraltar was not a second commission within the meaning of the order of August 28th, 1806. In the year 1816, the Board of Ordnance sent a communication to the defendants, announcing to them that they considered that persons in the situation of the deceased had never been entitled to the increase of pay under the order of August 28, 1806. However, notwithstanding this communication, the defendants still con-*519] tinued to debit themselves with this increased rate of pay *in their account with the plaintiff. There had been a running account between the deceased and the defendants, and in a statement of the account transmitted by them to the deceased up to November 5th, 1820, they gave credit to the deceased for the amount of this increased pay, as so much of his money in their bands. In the year 1821, the defendants wrote to the deceased, informing him that the Board of Ordnance had announced to them, that persons holding two ranks were not entitled to the increased pay, and claiming a repayment of 390%. 14s. 5d., being the amount of the increase of pay from the year 1806 to the year 1821.

Gurney, for the defendants.—It would be seen by that letter that his clients claimed a return of the increase from the year 1806, the Board of Ordnance having given notice that persons in the situation of the deceased had never been entitled to the benefit of the order of 1806; but on it being represented to that Board by the defendants, that they had paid large sums to various officers under an opposite construction of that order, the Board had consented to allow the pay up to the date of their notice in 1816, and had disallowed the pay afterwards. In the account transmitted by the defendants in the year 1820, they had given credit for these allowances by mistake, they having in fact never received them. This action being for money had and received, it could not be supported against the defendants, unless they had actually received the money, which, in fact, they have not. The defendants could have no objection to pay over all they ever received.

Scarlett, and Brougham, for the plaintiff.—It is well known that paymasters always receive the money before they pay over any part of it. They informed the deceased of the drawback in 1821, they knowing from the Ordnance-office, so early as 1816, that it would not be *allowed; and in the account delivered, four years after, they admit most distinctly that they have this money in their hands for the use of the deceased; and they were prepared to show, that the situation of brigade major of a garrison was not a commission.

ABBOTT, C. J. The account, admitting the receipt of the money, was delivered by the defendants in the year 1821, they having received an intimation from the Board of Ordnance, so early as the year 1816, that the extra pay would not be allowed to persons holding situations such as those filled by Major Skyring. This being an action for money had and received, the plaintiff must prove that the defendants have received such money for the use of Major Skyring; and I am of opinion that the account is evidence to show that; and that it further admits the money to be then in their hands. The question then is, whether, so very long after, the defendants can be permitted to say, that this was all a mistake, and then to make the plaintiff, in effect, refund the money. My opinion is, that they cannot; and I ground that opinion on this:—They

receive an intimation from the Board of Ordnance in 1816, that that increased pay will not be continued to certain officers; this, however, is not communicated to Major Skyring till 1821; but, on the contrary, the defendants admit the money to be in their hands. It would be very material to all men, and more especially so to military men, if a paymaster could admit a sum of money to be in his hands, and, four or five years afterwards, be allowed to say—It was all a mistake; I have not a farthing of yours in my hands, and as you have drawn on me on the faith of my having this money, you must pay me a large sum back again. I think therefore, without at all considering the terms of the order, that the defendants having so long acquiesced in the admission they had made, they cannot be permitted now to dispute it.

Verdict for the plaintiff.

*Scarlett, and Brougham, for the plaintiff. Gurney, for the defendants.

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[Attornies—Dyneley & Gathie, and Fynmore & Clark.]

In *Hilary* term, *Gurney* moved for a new trial, and the Court, after recommending that the point should be raised on a special case, granted a rule to show cause.

REX v. CLIFFORD.

Practice.—The Judge at the trial of a case cannot order any paper to be impounded, which is not given in evidence. It is not enough that it should be in Court in the possession of one of the witnesses.

INDIGITMENT for obtaining two bills of exchange of a hundred pounds each from Thomas Palmer, by false pretences.

The defendant was found guilty, and as soon as the verdict was pronounced. Chitty applied to the Lord Chief Justice to order one of the bills to be impounded; he stated that it was in Court in the hands of one of the witnesses.

ABBOTT, C. J. The bill was not put in evidence; any written paper that is in evidence I can order to be detained, but as this bill was not in evidence, I can make no order on the subject of it.

*ADJOURNED SITTINGS AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE ABBOTT.

BARTLETT, Gent., one, &c., v. DOWNES, Gent., another, &c.

The appointment of a person as steward of a manor for life is good.

If tenant in fee of a manor by deed appoints a steward of that manor for his life, and devises the manor in fee to a third person, such steward's appointment is valid, and he cannot be afterwards displaced by the devisee, when he becomes possessed of the manor under such devise.

If no evidence is given of the existence of a term to attend the inheritance since the year 1793, and the owner of the fee has acted as if it had been surrendered, the jury may pre-sume that it has been surrendered, the purpose for which the term was created having been long since fulfilled.

Money had and received.

The real question to be tried in this case was, whether the plaintiff was entitled to the office of steward of the manor of Denbury, otherwise Runsel, in the county of Essex.

*A lady named Ray, being tenant in fee of the manor, by a deed, executed in the month of July, 1821, granted to the plaintiff the office of steward of this manor, for the term of his natural life; and, by her will, devised the manor to Mr. Downes, the brother of the defendant. On her decease, he appointed the defendant steward of that manor. It was admitted, that there were copyholds in the manor, that the steward of that manor was entitled to receive fees, and that the defendant, as steward, had received fees to the amount of 61. before the commencement of the action; and it was also admitted that the plaintiff had offered to continue to act as steward since the decease of Mrs. Ray, but that he was not permitted to do so by Mr. Downes, the defendant's brother.

Scarlett, and Chitty, for the defendant, contended that the steward was the steward of the lord, and by no means annexed to the manor. The Crown might, perhaps, constitute a person steward for life; but in the case of a private person, if he conveyed away his manor, the former steward ceased to be steward to the new lord; and even if a party could encumber himself with a

† In the case of Boyter v. Dodsworth, 6 T. R. 681, which was an action for money had and received, brought by the sexton of the cathedral of Salisbury, against the defendant, who had wrongfully (as he contended) shown the cathedral, and for so doing received certain gratuities. Lord Kenyon, after deciding that the action does not lie for gratuities, lays down, that "if there had been certain fees annexed to the discharge of certain duties belonging to this office, and the defendant had received them, an assize would have lain; rabstituted in the place of an assise." It therefore becomes material to ascertain for what offices an assize will lie. In Jehn Webb's Case, 8 Co. 47 b, it is laid down, that "an assize lies for the office of steward, bailiff, or receiver of a manor." In that case, the assize lies for the office of steward, bailiff, or receiver of a manor." In that case, the question for what offices an assize would lie is very fully gone into; and, after stating that an assize will also lie for the offices of bailiff of a park, beadle of a hundred, packer of clothes, sheriff, if appointed for life, clerk of the Crown in Chancery, beadle of the honor of Westminster, porter of the court of the Archbishop of Canterbury, Filazer of the Court of Common Pleas, registrar of the Admiralty Court, or of a bishop's Consistory Court, it is is is down that an assize lies for all offices of profit, but not for offices of charge and no profit; and for this the Year Book, 27 Hes. 8, 12, is cited. And in 2 Inst. 412, it is laid down, that an assize lies for parcel of the profits of an office, if the party be only dississed of so much and not of the whole office; and that it lies not only for offices held in fee, but for offices in tail or for life: and L. C. B. Comyns lays down, that a tenant for years or other who has not the freehold cannot maintain an assize. Com. Dig. tit Assiss, (B. 5.) Accise, (B. 5.) 2 A

steward, yet such steward, being the servant of his lord, and not being attached to the manor itself, could not hold the office against the will of the purchaser of the manor.—Another ground of defence was, that Mrs. Ray was not tenant in fee of the legal estate; for that, by a family settlement of June 6, 1712, a term of five hundred years was created in certain property, of which the manor formed a part: it was a term to raise portions for younger children. This term was, by a deed dated February 2d, 1785, assigned to attend the inheritance; and when, in the year 1793, this manor was bought by the husband of Mrs. Ray, it *appeared that this term was still kept alive for the protection of the inheritance.

Marryat contended, that the circumstance of no evidence being given of the existence of this term since the year 1793, the jury ought to presume its ser-

render.

ABBOTT, C. J. I think I ought to ask the jury, whether they consider this term to have been surrendered or not. It was created in the year 1712, for a purpose long since fulfilled, and the last account given of it, by the evidence adduced on the part of the defendant, is, that it was in existence in the year If the party now suing were the owner of the estate, he would be in a condition to produce the deed by which it was surrendered, if any surrender had taken place; but the plaintiff not having that deed (if there be such a one) and not having the means of compelling its production, cannot be expected to give any evidence on the subject.

The jury having stated that they presumed the term to have been surrendered, were directed by his Lordship to find a verdict for the plaintiff, which

they accordingly did.t

Marryat, and Ryan, for the plaintiff. Scarlett, and Chitty, for the defendant.

[Attornies—Bridges & Q., and Downes.]

† In the case of Harvey v. Newlyn, Cro. Eliz. 859, Sir James Allington had granted the plaintiff, by deed, to be bailiff of his manor for life, and the defendant disturbed him in collecting the rents. The defendant confessed the seisin of Sir James Allington, and his grant to the plaintiff, but said that Sir James had sold the manor to J. S., who had appointed him the defendant to be significant. him (the defendant) to be bailiff. All the Court were of opinion that the purchaser might discharge the plaintiff and revoke the grant, because it was not shown that there was any fee granted for the execution of it, nor any profits, and therefore it would be a mere office of trouble, and the plaintiff could not complain of the loss: "but if he were to have

And a fee or other profit in certain. for executing thereof, it had been otherwise."

And in the case of Sir Robert Howard v Wood, Sir T. Jones' Rep. 126, (reported also in 2 Mod. Rep. 173, 2 Lev. Rep. 245, and 2 Show. Rep. 21.) it was held, that the stewardship of a manor was legally grantable in reversion for a term of years determinable on the decease of the grantee; but the Court were of opinion that it was not grantable for a term of years absolute, as it might then pass to executors and administrators, or be in abey acce after the decease of the grantee and before administration granted.

*BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS. [*525

In Banc.

Scarlett moved for a rule nisi, for a new trial in this case, on both the grounds taken at Nisi Prius, and the Court took time to consider.

The Court now gave judgment on Scarlett's application.

ABBOTT, C. J. We think we ought to refuse Mr. Scarlett's rule. It was said, that the grant of the stewardship of a manor for life was not good by a

subject, though it might be good if granted by the Crown, and that a subject could not create an office for life; but, here, the party does not create the sflice, but only grants that office to a particular person for life; and if the granter could not displace his grantee, there is no reason why any other person should have the power of doing so. In the case of *Harvey v. Newlyn*, Cro. Eliz. 859, which was an action for disturbing the plaintiff in his office of bailiff of a manor, he had been appointed bailiff of the manor for his life; and the person who had so appointed him a bailiff *sold the manor to another, who appointed the defendant. The Court held, in that case, that if it had been shown, that there were fees attached to the office, or any certain profits, the action would have been maintainable. On the other point: I left it to the jury to say whether the term had been surrendered or not. The defendant was admitted to be the brother of the present owner of the manor, and was therefore in a condition to give the best evidence of the existence of this term; and it appeared that it was in existence as a term to attend the inheritance in the year 1793. The general principle on this subject is, that whatever ought to have been done is presumed to have been done; and if the surrender of this term were not presumed, it would defeat the acts of the owner of the inheritance: and the Courts have, in many instances, held, that juries were at liberty, where the term had done its duty, and the owners of the estate had acted as if the term did not exist, to presume that it had been surrendered. We think it was rightly left to the jury, as this term goes entirely to defeat the acts of the real owner of the estate. It is also worthy of notice, that if this term were actually surrendered, the deed by which it was surrendered would not be in the power of the plaintiff, but of the defendant, or of the gentleman under whom he claims to act; but this rather goes to the propriety of the finding of the jury than to the question to be left to them. For these reasons, we think we ought to refuse the rule.

Rule refused.

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*BEFORE MR. JUSTICE LITTLEDALE.

(Who sat for the Lord Chief Justice.)

REX v. LYNN and DEBNEY.

In an indictment for obstructing a common highway, the highway may be laid as a common highway for carts, carriages, &c., although it has always been arched over, provided that it is capable of being used by all ordinary carriages, and notwithstanding the archway be not sufficiently high to permit road wagons and other carriages of unusual dimensions to pass under it.

If two persons are jointly indicted for obstructing a highway, and on the evidence no joint act of obstruction appears, the Judge will, as soon as the case for the prosecution is closed, put the prosecutor's Counsel to elect which of them they would proceed against,

and then take an acquittal for the other.

INDICTMENT for a nuisance in obstructing a common highway, which was laid in the indictment to be a common highway for carts, carriages, &c.

The way in question was a very narrow street, connecting Sidmouth-street, Meeklenburgh-square, with James-street. From the evidence, it appeared,

that the whole of the streets, lanes, and passages, had been built on the estate of a person named *Harrison*, and that the way in question was arched, having buildings over it. It also appeared, that all ordinary carriages could pass along it under the archway, but that a wagon loaded very highly, as road wagons, and wagons carrying cotton usually are, could not pass under this arch for want

of height.

F. Pollock, and Abraham, for the defendants, contended, that this was not a public highway, for that it could not have been dedicated to the public as a common highway, it being arched over; and that if a verdict of guilty was found in this indictment, the party who was the owner of the buildings over the archway, might be compelled to pull them down, to make the highway passable for all carriages whatsoever. It should (if it were a way at all) have been described specially, as it is, for if there were any dedication to the public, it was not general, but restricted by the size of the archway keeping out high carriages.

Gurney, and Chitty, for the prosecution. It has been proved to be a way generally used, and capable of being *used by all ordinary carriages, partial which is sufficient to constitute it a public highway; many public streets have arches over them, and more had formerly, Scotland-yard is so now, and Castle-street, Holborn, and St. Thomas's-street, Borough, were so formerly.

LITTLEDALE. J. I shall reserve the point, whether a way of this kind, which can be used by all ordinary carriages, is not a public carriage way.

The defendants had one succeeded the other in the occupation of a house at the place in question, and there being evidence of an obstruction of the way by the defendants separately, but no evidence of any obstruction by them both at the same time—

LITTLEDALE, J., put it to the Counsel for the prosecution, to elect which defendant they would proceed against, as no joint offence was in evidence.

Gurney electing to proceed with the case against the defendant Debney,

The jury found him guilty, the other defendant not guilty.

Gurney, and Chitty, for the prosecution. F. Pollock, for the defendant Lynn. Abraham, for the defendant Debney.

[Attornies—Harmer, and Hurd.]

*BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS. [*639

In Banc.

In Hilary Term, Abraham moved on the point reserved, and argued, that in the indictment, this highway should not have been laid generally to be a public highway for carts and carriages, but specially as a highway, sub modo, for carriages of a certain description, as it had never been dedicated to the public except for a restricted use by carriages not exceeding certain dimensions.

Per Curiam. If it is a way fit for all carriages which are in ordinary use, it is properly laid in the indictment to be a public highway for carts, carriages, &c., although some carriages of unusual size may not be able to use it.

Rule refused.

WHARTON v. LEWIS.

In an action for breach of promise of marriage, if it appear that the defendant was induced to make the promise, or to continue the connexion, either by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff; this goes in bar of the action, and not to the damages only: and if the defendant's Counsel cross-examines as to certain misrepresentations made towards the defendant, and deceptions practised on him; this is to be considered as notice to the plaintiff's Counsel of the line of defence: and, therefore, if he has letters of the defendant, tending to show that he knew the real state of the facts, the plaintiff's Counsel ought to give them in evidence before the plaintiff's case is closed, and he will not be allowed to put them in as evidence in reply.

Breach of promise of marriage. The promise was proved by parol evidence, and the plaintiff's witnesses were cross-examined as to certain misrepresentations made to the defendant's father relative to the circumstances of the plaintiff's family, and the situations she had previously filled.

The defence was, that the defendant had made the *promise under fraudulent and false representations of the plaintiff's former situation, and the circumstances of her family; and it was proved that her brother (in whose house she was residing, and who was a witness for the plaintiff) had stated to the defendant, previously to the promise, that her father would leave property to her at his death; whereas, in fact, he had, a short time before, compounded with his creditors: and it also appeared from the evidence of the defendant's father, that, a few days after the promise, he received an anonymous letter, stating, among other things, that she had been a bar-maid, and had carried on the business of a milliner, at Oxford, with another lady who was then in keeping; and that the defendant, in consequence, broke off the match: but on this letter being shown by the defendant's father to the father and brother of the plaintiff, they represented that these statements were false, and the courtship was renewed, but afterwards finally broken off. It was now proved that the plaintiff had acted as bar-maid at Mivart's hotel, and had previously carried on the business of a miliner at Oxford under circumstances of suspicion, the marshal of the University having had directions from the proctors to keep a watch on the house.

As soon as the defendant's case was concluded, Brougham wished to give as evidence in reply, to cut down the evidence of the defendant's father, two letters written by the defendant, which went to disprove any deception, by showing that he was aware of some of these facts before the match was broken off.

Scarlett objected, that his cross-examination of the plaintiff's witnesses, as to the deceptions practised on the defendant, gave notice to the plaintiff's Counsel of what line of defence he was taking, and, therefore, the plaintiff's *531] Counsel ought to have given these letters in evidence, to *show that there was no deception, before he had closed his case, but that they were not admissible in reply.

ABBOTT, C. J. By very strict rule, the cross-examination must be held to be notice to the plaintiff's Counsel that it was intended to be alleged by the defendant that deceptions had been practised; and therefore the plaintiff's Counsel ought to have gone into evidence to rebut that, before he closed his case. I think I must, therefore, reject the evidence.

Brougham having replied-

ABBOTT, C. J., left it to the jury to say, whether the defendant was induced to make this promise, or to continue this connexion, by false representations or wilful suppression of the truth; for if he was induced to continue the connexion by misrepresentation or wilful suppression of the real state of the circumstances

of the family and previous life of the plaintiff, it was a good defence to this action, and the defendant was entitled to their verdict.

Verdict for the plaintiff—Damages 150L

Brougham, and Abraham, for the plaintiff. Scarlett, and Lawes, for the defendant.

[Attornies-Manning, and W. Hodgson.]

*JAY, Gent., one, &c., v. WARREN.

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A cognovit, which merely gives the defendant time, does not require an agreement stamp. Semble, that taking a cognovit of the acceptor of a bill after an action brought against him, and by that giving him three weeks' time before entering up judgment, is not such a giving time as will discharge the other parties to the bill.

Assumestr by the plaintiff as indorsee, against the defendant as indorser of a bill of exchange for 381. 8s., drawn by a person named *Elsam* on a person named *Brooke*, three months after date.

The defence was, that the plaintiff had given time to the acceptor, by taking a cognovit of him which gave three weeks' time. The cognovit was tendered

in evidence.

Brougham objected, that the cognovit ought not to be received in evidence, as it was not stamped, and that it required a stamp, being used in this case as an agreement to give time to the acceptor, and it contains a clause that no judgment should be entered up till the 25th of May. That is clearly matter of agreement. A mere cognovit certainly required no stamp; but if it contained matter of agreement, it must bear an agreement stamp. Eames v. Hill, 2 Bos.

& Pull. 150; Reardon v. Swaby, 4 East, 188.

ABBOTT, C. J. If this cognovit is put in and read, is that a giving time within the meaning of the rule, because the party has brought his action against the acceptor, and by these means obtains judgment against him? Is there any decision which lays down, that if after action brought the party takes a cognovit, that is a giving of time? As at present advised, I think this cognovit admissible in evidence without a stamp; but I am of opinion that it is no answer to this action. The mischief of holding that this discharged the other parties to a bill would be infinite. Suppose the indorsee of a bill brought an action against the acceptor, who appeared and pleaded: if the indorsee did not file his replication as soon as he might do, it *would be said that he gave time to the acceptor. The defence cannot be sustained.

Verdict for the plaintiff.

Brougham, for the plaintiff. Hutchinson, for the defendant.

[Attornies—Jay & B., and Warren.]

See Lee v. Levy, infra. In the case of Ames v. Hill, 2 Bos. & Pull. 150, it was held that a mere cognovit did not require a stamp: but that if it contained any thing of agreement beyond the mere authority, it must have an agreement-stamp.

ment beyond the mere authority, it must have an agreement-stamp.

And in the case of Reardon v. Swaby, 4 East, 188, it was held, that if the cognevit contained an agreement to take the debt by instalments, it must have an agreement-stamp;—and recognised the authority of the case of Ames v. Hill.

PHILIPE, Gent., one, &c., v. BAKER.

If one is admitted to defend a suit in Chancery, in forma pauperis, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit.

Assumest for business done as a solicitor, with the common money counts. Plea—General issue

It appeared that a bill in Chancery had been filed against the defendant by a person named Allen, and that he had employed the plaintiff as his solicitor, to enter an appearance for him, and to put in an answer to that bill; but the defendant being poor, the plaintiff had, before the answer was put on the file, prepared a petition for him to defend that suit in forma pauperis, the prayer of which petition having been granted by the Lord Chancellor, the appearance in Chancery was entered, and the answer put in in forma pauperis, and the suit there had not proceeded any further. The amount of the plaintiff's bill was 141. 14s. 6d.

*ABBOTT, C. J. As the defence of the suit in Chancery was in forma pauperis, I am of opinion that the plaintiff, as his solicitor, can only recover the amount of the money he actually paid out of pocket.

Verdict for the plaintiff—Damages 2l. 1s. 4d.†

N. Clarke, for the plaintiff. The defendant in person.

[Attornies-Philipe, and In person.]

† This sum did not include any thing either for attendance, lose of time, drawing or engressing, copies, or service of orders; but only the money paid out of pocket by the plaintiff as solicitor, and the parchment on which the answer in Chancery was written.

PARTRIDGE v. COATES.

Pleading.—In a declaration, for usury, the day from which the forbearance is to commence, is material, and must be truly stated. If no day is stated, it will be bad. If a wrong day is laid, it will be a fatal variance.

DEET for penalties for usury.

The first count of the declaration stated, that one Thomas Dauncey had drawn a bill of exchange, payable to his own order, which had been duly accepted by one Daniel Orphin; and that after the 29th day of September, 1714, to wit, on the 3d day of July, 1824, it was corruptly, &c., agreed between the defendant and the said Thomas Dauncey, that the defendant should lend and advance to the said Thomas Dauncey 1001., "and should forbear and give day of payment for the same unto the said Thomas Dauncey, from the time of lending the same," until the said sum of money (secured by the bill) should become due and payable, to wit, until the 6th of October next following; and that the defendant for such "forbearance should receive from the said Thomas Dauncey the sum of 6l. 5s.: and for the securing the 100l., the bill was to be assigned to the defendant. And "that in pursuance of the said corrupt bargain and agreement so made as aforesaid, he the said defendant, afterwards, to wit, on the said 3d day of July, to wit, at, &c., did lend and advance to the said Thomas Dauncey the said sum of 100l.," &c.; it then

proceeded to aver payment of the usurious interest, &c. The other counts of the declaration were similarly framed, as far as regarded the point on which

the case ultimately turned.

From the evidence, it appeared that the defendant had received 6l. 5s. of Thomas Dauncey, and for that the defendant had discounted the bill mentioned in the declaration, by giving him a check on his banker, dated July 3d; but it was proved, that, in point of fact, the amount of the check was paid in cash to Dauncey on the 5th of July, and not on the third.

Denman, F. Pollock, and Holt, for the defendant, contended that this was a fatal variance, as the declaration stated a corrupt contract for an usurious loan from the 3d of July, and an advance of the money on that day. The time was, in cases of usury, most material, as being the only thing that made the taking the amount to be paid as interest, usurious or not, and, therefore, it ought to be truly stated. Harris v. Hudson, 4 Esp. 152; Carlisle v. Trears, Cowp. 671.

ABBOTT, C. J. The distinction in this case is, that the forbearance is stated

not to be from one day to another, but from the time of the lending.

The defendant's Counsel. Then, my Lord, it would not be necessary to put any day at all, as the time from which the forbearance was to be; but we contend, that it must appear on the face of the record that usury *has been taken, which can only be by a particular sum being taken for forbearance between two given days; and if the time is material, laying the day under a videlicet makes no difference.

Scarlett, and Abraham, contra. It is only necessary that the interest should be alleged to be usurious and taken on an usurious contract; and though if it be alleged that the contract was for forbearance between given days, those days must be proved, still no case has yet decided that it is necessary to state a precise day: and it is sufficient to allege that the sum was to be paid as interest from the time of the lending, and that it was at an usurious rate of interest.

ABBOTT, C. J. It appears to me, that, in a declaration for usury, it is necessary to show that the period of forbearance was such that the sum taken exceeded the legal interest. Here it is only alleged to be from the time of the lending. Now, that might be so long a time from the other day as to make the sum received not exceed the rate of 5 per cent. for a year: and if it be said, that in this declaration there is a day stated, that is, the 3d of July. which is a wrong day, I think the plaintiff must be called.

Nonsuit.

Scarlett, and Abraham, for the plaintiff. Denman, F. Pollock, and Holt, for the defendant.

[Attornies—H. Thomas, and Hodson.]

In the case of Carlisle, qui tam, v. Trears, Cowp. 671, the plaintiff having declared on an usurious contract on the 21st of December, 1774, giving day of payment to the 23d of December, 1776, and the evidence being of a contract on the 23d of December, 1774, for the ware this was held to be a fatal variance.

two years; this was held to be a fatal variance.

*In the case of Harris, qui tam. v. Hudson, 4 Esp. 152, the day of the advance of the money was laid under a videlicet, but it was held that a variance in the day was fatal. And it was ruled in the cases of Brooks, q. t., v. Middleton, 1 Camp. 445, and Borrodaile, q. t., v. Middleton, 2 Camp. 53, that if the money is advanced upon usury by a check, the forbearance is only from the time at which the check is converted into cash.

ORME, who sues, &c., v. CROCKFORD.

Practice.—If a case be not gone into, the Judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for penalties to a very large amount, and because persons of considerable rank are called on their subpassas.

DEST, for penalties under the statute of 9 Ann. c. 14, for winning excessive sums of money at play. The penalties sought to be recovered amounted to

many thousand pounds.

The plaintiff's Counsel, after having had several witnesses called on their subpenas, some of them persons of high rank, stated (without the case having been at all gone into) that they were in no condition to prove their case, and the plaintiff was nonsuited.

The Attorney General (as Counsel for the defendant) applied to the Lord Chief Justice to certify that this was a fit case to be tried by a special jury, from the nature of the case stated on the record, and the great amount of the penalties sought to be recovered.

ABBOTT, C. J. I cannot certify that the cause was fit to be tried by a

special jury on a mere view of the record.

The Attorney General. But your Lordship has the additional circumstance

of the high rank of some of the witnesses.

*538] *Abbott, C. J. As the case has not been gone into, I cannot certify for the special jury.

C. Phillips, and Patieson, for the plaintiff. The Attorney General for the defendant.

[Attornies—Litchfield, and Surman.]

The Apothecaries' Company v. BENTLEY.

Onus probandi. In an action of debt, on the Apothecaries' Act, 55 Geo. 3, c. 194, s. 20, for a penalty for practising as an apothecary, without having obtained a certificate from the Apothecaries' Company under that act, it is not necessary, on the part of the plaintiffs, to prove that the party has not obtained his certificate, the onus lying on him to show that he has. It must, however, be averred in the declaration that he has not. Whether a party incurs only one penalty by a continued practising as an apothecary, though he attends several patients, or whether he incurs a fresh penalty for each patient that he attends—Quere.†

DEET, for penalties for practising as an apothecary, without having obtained a certificate from the Apothecaries' Company.

† The statute 55 Ges. 3, c. 194, enacts—s. 9, "And be it further enacted, That for the purposes of this act, so far as the same regards the examination of apothecaries, and assistants to apothecaries, twelve persons properly qualified, as herein-before is mentioned, shall be chosen and appointed by the said Master, Wardens, and Assistants for the time being, (who are hereby authorized and empowered to choose and appoint such persons, and to remove or displace them from time to time, as they the said Master, Wardens, and Assistants for the time being, shall deem advisable.) and such persons, when so chosen and appointed, or any seven of them, shall be, and be called the Court of Examiners of the Society of Apothecaries; and such Court of Examiners, or the major part of them present at any meeting, shall have full power and authority, and are hereby authorized and empowered to examine all apothecaries, and assistants to apothecaries, throughout England and Wales, and to grant or refuse such certificate, as herein-after is mentioned; and such Court of Examiners, or the major part of them, shall, and they are hereby

310 Apothecaries' Co. v. Bentley. M. T. 1824. [*539

*The different counts of the declaration charged fresh penalties to have been

incurred by attending different persons.

ABBOTT, C. J., doubted whether a fresh penalty attached for every acting as an apothecary towards each different patient, and whether more than one penalty attached for a *continued practising as an apothecary, though [*540] the party attended different persons as patients.

On the part of the Company, no evidence was given that the defendant had

not obtained his certificate from the Company.

Brougham objected, that it was incumbent on the Company to prove this. If in the act the certificate had been mentioned in a separate proviso, as an exemption from the penalty, it would then be matter of defence; but as it was incorporated in the clause which gave the penalty, it must be negatived by an averment in the declaration, and that averment must be proved.

Scarlett, contra. I admit that it must be negatived in pleading; but as it is a negative averment, it need not be proved. In actions for penalties under the game laws, the plaintiff is obliged to aver that the defendant is not qualified to

kill game, but he is not held to prove that averment.

ABBOTT, C. J. As it is in the negative, the proof lies in the defendant. Verdict for the Company for one penalty of 201.

Scarlett, and Campbell, for the Company. Brougham, and Platt, for the defendant.

[Attornies—Hore & B., and Howard.]

Negative averments in the declaration need not generally be proved on the part of the plaintiff. In the case of Spieres v. Parker, 1 T. R. 144, Lord Mansfeld says, that "the plaintiff must, as in actions on the game laws, aver a case within the act; and therefore he must negative the exceptions in the enacting clause, though he "throw the burden post of proof on the other side."

In the case of Jefs v. Isaacs, 1 Bos. & Pul. 468, it is laid down, that the plaintiff must state in his pleadings every thing that entitles him to recover; but that it is a very different question what is to be proved by one party and what by the other.

In the case of Rex v. Turner, 5 M. & S. 206, it was held, that though in an information on the game laws it is necessary to negative the defendant's qualification to kill game, yet

on the game laws it is necessary to negative the defendant's qualification to kill game, yet it lies on the defendant to show that he is qualified: and in Jeffs v. Isaacs, above cited, Mr. Justice Heath lays down, that this is an averment necessary on the part of the prose-

required to meet and assemble in some convenient room in the Hall of the said Society, once at least in every week, for the purpose of such examination, and then and there to examine all persons applying to be examined, and duly qualified so to be by virtue of this act.'

s. 14. "And to prevent any person or persons from practising as an apothecary, without being properly qualified to practise as such, be it further enacted, That from and after out being properly qualified to practise as such, be it further enacted, That from and after the first day of August, one thousand eight hundred and fifteen, it shall not be lawful for any person or persons (except persons already in practice as such) to practise as an apothecary in any part of England or Wales, unless he or they shall have been examined by the said Court of Examiners or the major part of them, and have received a certificate of his or their being duly qualified to practise as such from the said Court of Examiners of the major part of them as aforesaid, who are hereby authorised and required to examine all person and persons applying to them, for the purpose of ascertaining the skill and abilities of such person or persons in the science and practice of medicine, and his or their fitness and qualification to practise as an apothecave; and the said Court of Examiners. fitness and qualification to practise as an spothecary; and the said Court of Examiners, or the major part of them, are hereby empowered either to reject such person or persons, or to grant a certificate of such examination, and of his or their qualification to practise

or to grant a certificate of such examination, and of his or their qualification to practise as an apothecary as aforesaid: Provided always, that no person shall be admitted to such examination until he shall have attained the full age of twenty-one years."

s. 20. "And be it further enacted, That if any person (except such as are then actually practising as such) shall, after the said first day of August, one thousand eight hundred and fifteen, act or practise as an apothecary in any part of England or Wales, without having obtained such certificate as aforesaid, every person so offending shall for every such offence, forfeit and pay the sum of twenty pounds; and if any person (except such as are then acting as such, and excepting persons who have actually served an apprenticeship as aforesaid) shall, after the said first day of August, one thousand eight hundred and fifteen, act as an assistant to any apothecary, to compound and dispense medicines, without having obtained such certificate as aforesaid, every person so offending, shall for every such effence forfeit and pay the sum of five pounds."

cutor, but that the cause probands on this point lies on the defendant. And in the case of Mann v. Davers, clerk, 3 B. & A. 103, where a party was convicted of returning to a parish from which he had been legally removed, without bringing with him a certificate from the parish to which he had been removed, it was held that the proof lay on him to show that he did not return as a vagrant, but that he had lawful reason for so doing. However, in the case of Res v. Rogers, 2 Camp. 654, which was an indictment on the statute 42 Geo. 3, c. 107, s. 1, which makes it a felony to hunt deer in an inclosed park or ground, without the consent of the owner, Mr. Justice Lawrence held, that it was necessary to call the owner to prove that he did not consent. But this was probably on the ground that his not consenting was a matter peculiarly within his knowledge.

GILLON v. BODDINGTON, Esq.

The plaintiff, in 1822, had a remainder in fee in a wharf expectant on a tenancy for life of his father. The defendants, in that year, dug soil out of their dock, which was contiguous, and the water thereby undermined the wall of the wharf. In 1823, the plaintiff's father died; and in 1824, the action of the water on the wall had undermined it so far that it fell:—Held, that the plaintiff had a right of action against the defendants, although they had done no act since the death of the plaintiff's father, by which the plaintiff came into possession of the freehold of the wharf. By a private act of Parliament, it was enacted, that the defendants (the London Dock Company) should be sued within "six calendar months after the fact committed:"—Held, that the limitation ran from the time of the consequential injury happening, and not from the doing of the act which caused that consequential injury; as, here, the act itself was not tortious or injurious, except from those consequences which occurred some time after.

Action on the case.

The declaration stated, that the plaintiff now is, and was, at the several times when a certain wall, after mentioned, was suffered to remain undermined, injured, shaken, &c., and when the soil under the said wall was washed away, *542] and *when a part of the said wall fell down, and the remainder thereof became in a ruinous state, seised in his demesne as of fee of and in the reversion of one undivided third part of a certain wharf, subject to a tenancy from year to year of Thomas Gray and William Thacker therein; and that the London Dock Company, on the first of January, 1818, and on divers other days and times between that day and the first of January, 1824, at, &c., wrongfully and unskilfully, had caused a great quantity of mud, &c., to be excavated and dug from the bed of a certain dock, called Hermitage-dock, by means of which a certain wall of the said wharf, (called Downe's wharf,) became undermined and shaken, and the soil under the same loosened, by the tide which flowed into the said dock from the river Thames; and that the Company negligently permitted the same to remain so undermined for a long space of time, to wit, seven years, until divers parts of the wall, on divers days since the 1st of January, 1824, fell down, and the remainder thereof became in so ruinous a state, that it was necessary, to prevent further damage to the wharf, that it should be taken down; by means of which premises the plaintiff was greatly injured in his reversionary estate and interest aforesaid, to a large amount, to wit, 2000l. Plea-General issue.

It was admitted that the defendant was the treasurer of the London Dock Company, who, by a private act of Parliament, 39 and 40 Geo. 3, c. 47, are to be sued in the name of their treasurer. And from the evidence, it appeared that the plaintiff was tenant in fee of an undivided third part of the wharf in question, subject to a tenancy from year to year; and that he had so become owner of it on the decease of his father, (who had had an estate for life in it, under the will of a person named Downe,) in the year 1823. And it was proved, that, in the year 1822, the London Dock Company had excavated the

bed of one of their docks, called the *Hermitage-dock*, on one side of which the wall in question was; and that by such *excavation, the foundation of the wall was exposed to the action of the tide, and that a considerable portion of the wall fell in the year 1824, when it was considered absolutely necessary to take down the remainder of it, as it was then in a very ruinous state.

Scarlett contended, that the plaintiff must be nonsuited; 1st, because the declaration stated, that the plaintiff was and now is seised of a reversion in sec, subject to a tenancy from year to year; whereas the injury being caused by the excavating done in 1822, the declaration should have been for an injury done to his reversion expectant on the tenancy for life of his father; and he further argued, that as the injury was done in 1822, in the father's lifetime, and he could have brought an action for it, the present plaintiff could not maintain any action at all. And 2d, because the action, if maintainable, was brought too late. By the London Dock Act, 39 and 40 Geo. 3, c. 47, s. 151, it is enacted, that "no action or suit shall be commenced against any person or persons for any thing done in pursuance of this act, until twenty days' notice shall be given to the person or persons against whom the same is to be brought, nor after a sufficient satisfaction or tender thereof hath been made to the party or parties aggrieved, nor after six calendar months next after the act committed; and such action or suit shall be laid and brought in the county of Middlesex, and not elsewhere: and the defendant or defendants in such action or suit, shall and may plead the general issue." Now the fact committed by the Company, which caused the damage, was in the year 1822, if at all, and therefore, more than six months having elapsed, the plaintiff must be called.

The Attorney General, Taunton, and Bayley, contra. This is an action on the case, for a consequential damage; and it has been decided that in such actions for consequential damage, the period of limitation is not calculated from the time of the fact, but from the time of the consequential damage. [*544 Roberts v. Read and Others, 16 East, 215; Sutton and Clarke, 6 Taunt. 40 n. If an act be done which will probably occasion damage, no action can be maintained for it; and if it could not be maintained, now the damage has happened, the party grieved would be without remedy. As to the first point, the same principle applies. The consequential damage was after the decease of the plaintiff's father, as the wall fell in the year 1824.

Scarlett, in reply. I submit, that there was a cause of action in 1822, because it was then known that the wall was undermined, although it had not then fallen; and the plaintiff coming in as a remainder-man, is not different from the case of a purchaser: and if one had purchased this wharf, knowing the state of the wall, could he be allowed to say, I will wait till the wall falls down, and then bring an action against the Company? I therefore contend, that, six months have elapsed since the injury was done, the plaintiff is barred; and, further, that as it was done before he became possessed of the property, he cannot recover on this declaration.

ABBOTT, C. J. I think that the case of Roberts v. Read is an answer, by way of authority, to the objection as to the limitation of the action; and I have great pleasure in finding that decision, as it shows the wisdom of the law in not too strictly adhering to the words of an act of Parliament, where they would work injustice. It also furnishes an answer to the other point. I take it that the washing away of the foundation of the wall had commenced before the plaintiff's title accrued; but for the falling of the wall, which occurred after, the plaintiff may recover. I think this case quite distinguishable from that of a purchaser for money; but I do not say that even then the action would not lie.

*The defence was, that the wall fell through mere decay. This was, above to the contract of th

Attorney General, Tounton, and Bayley, for the plaintiff. Scarlett, Bosanquet, Serjt., F. Pollock, and Carter, for the defendant.

[Attornies-Brooksbank & Co., and Teesdale & Co.]

In the case of Roberts v. Read, 16 East, 215, the surveyors of highways of Penzance had undermined the plaintiff's wall, which fell some months afterwards. By the statute 13 Geo. 3, c. 78, s. 81, surveyors of highways must be sued within three calendar months after the fact committed; and this action was brought within three months after the wall self the self committee; and this action was brought within three months after the wall fell, but more than three months after the underming. The Court decided, that if the action had been trespass, it must have been brought within three months after the act of trespass complained of; but being an action on the case for consequential damage, it could not be brought till the specific wrong had been suffered.

In the case of Sutton v. Clarke, 6 Taunt. 29, this point was not expressly decided.

FOOTE v. HAYNE.

A party will not be allowed to go into evidence of the time when the Counsel for the opposite party was retained, either by calling the Counsel's clerk or otherwise; as the retaining of Counsel falls within the rule respecting confidential communications.

If, is an action for breach of promise of marriage, the defence set up is, that the defendant was induced to make the promise through misrepresentations made to him; and it is proved that the plaintiff knew that her father wrote letters to the defendant, in which he made statements respecting her; such letters are evidence for the defendant, although there is no proof that the plaintiff had read them, or was acquainted with their exact contents; but the plaintiff would not be considered answerable for the particular expressions contained in them. sions contained in them.

But a verbal representation made by the plaintiff's father (she not being present) to a third person, who communicated it to the defendant, is not evidence.

Breach of promise of marriage.

By the evidence, on the part of the plaintiff, (Miss Foote, the celebrated actress,) it appeared that the defendant had made several distinct promises to marry the plaintiff, and had broken off the match after each of the promises. *546] It also was admitted that the plaintiff had had *two children by Colonel Berkeley; but of this the defendant was aware after the breaking off the first promise, and before the making of the second.—The plaintiff's attorney was called, on the part of the plaintiff, and asked whether he had not, on or about the 29th of September, 1824, applied to Mr. Scarlett's clerk at his chambers, for the purpose of retaining him as Counsel, and whether he was not shown a book? The object of this was, to show that the defendant had retained Mr. Scarlett as his Counsel in any action the plaintiff might bring against him, on the very day on which one of the later promises was made. Scarlett. This is really not evidence. My clerk is in attendance, having

been served with a subpæna duces tecum, to produce my retainer-book. ABBOTT, C. J. I cannot receive any evidence of the retainer of the opposite Counsel. I am decidedly of opinion that it ought not to be put in evidence, as it comes clearly within the rule with respect to confidential communications.

The defence was, that the defendant had been deceived into making these promises, by the false representations made to him by the plaintiff, and her father and mother, with her knowledge. On the cross-examination of the plaintiff's witnesses, it was proved that the plaintiff had told the defendant, when he first made his proposals, that she could not give any answer, till a promise of marriage she had made to Colonel Berkeley was put an end to: *547] but that, in fact, at that time she was in a state of pregnancy; and that when she left *London* for her second *accouchement, she knew that her father, who remained in London, wrote letters to the defendant, respecting her, though it did not appear that she knew the exact contents of any of these letters.

The defendant's Counsel wished to give these letters in evidence, to show the misrepresentations that were made to the defendant; the letters stating that the plaintiff had gone into the country for a pulmonary complaint.

The plaintiff's Counsel objected that they were not evidence, because they were written by a third person, and the plaintiff was not proved to have been

acquainted with their contents.

ABBOTT, C. J. As it is in evidence that the plaintiff assigned as the reason of her not giving an answer to the defendant's proposals, that she was under a promise to marry Colonel *Berkeley*, it is open to the defendant to give in evidence any thing to show that that was not true; and as it is also in proof that the plaintiff knew that her father was making representations to the defendant respecting her, his letters are evidence, though the plaintiff will not be answerable for the particular expressions contained in them.

The letters of Mr. Foote were read.

The defendant's Counsel then wished to call a witness to prove that the plaintiff's father had (at a time when the plaintiff was not present) made a representation to him of the good conduct and character of the plaintiff, which he had afterwards communicated to the defendant.

ABBOTT, C. J. That is certainly not evidence. I have already received what, in the strictness of former times, would not have been thought admissible.

Verdict for the plaintiff—Damages, 3000l.

The Attorney General, Gurney, and Platt, for the plaintiff.

Scarlett, Brougham, and Adolphus, for the defendant

[*548]

[Attornies—G. Gill, and Carter.]

REX v. PARKINS, Esq.

Practice.—On the trial of an indictment for perjury, the Judge will allow the defendant to address the jury, and cross-examine the witnesses, and his Counsel to argue points of law, and suggest questions to him for the cross-examination of the witnesses.

INDICTMENT for perjury. As soon as the case was called on, the defendant stated it to be his intention to address the jury in person, but he wished his Counsel to cross-examine the witnesses for the prosecution, and argue any matter of law that might arise.

ABBOTT, C. J. The case may be conducted by the party himself as to matters of fact, and his Counsel may argue for him any point of law; but as to fact, I cannot allow the case to be partly conducted by the party and partly

by Counsel.

Langslow, for the defendant. In the case of Redhed Yorke, on the Northern Circuit, the party himself addressed the jury, but was allowed to have the assistance of Counsel to cross-examine the witnesses; and in the case of Rex v. White, 3 Camp. 98,‡ I understand that all that Lord Ellenborough meant to prevent was the irregularity of two cross-examinations for the same defendant

[†] Tried at the York Assizes, before Mr. Justice Rooks.

[†] In the case of Rex v. Wright, which was a trial of a misdemeanor, Lord Ellenborough ruled, that the defendant might cross-examine and address the jury in person, and have the assistance of Counsel to argue any point of law.

*Scarlett, contra. In the case of Redhed Yorke, Mr. Hotham, a provincial Counsel, cross-examined the witnesses, and it was thought that he was retained to conduct the case of the defendant in the usual way; but when the prosecutor's case was concluded, he, to the surprise of every one, sat down, and the defendant himself rose to address the jury; and as the case then stood, the learned Judge allowed him to proceed: but Lord Ellenborough (who was then at the bar) expressed his disapprobation of it.

ABBOTT, C. J. The defendant may conduct the case in person as to matters of fact, and have the assistance of his Counsel to argue matters of law, but if he addresses the jury in person, he must cross-examine the witnesses; for if Counsel cross-examined, and the party spoke, great inconvenience would ensue. However, I shall allow the defendant's Counsel to suggest questions to him; and that he may have the full benefit of their assistance in that respect, he may, during the examination of the witnesses, sit at the bar with his Counsel, and return to the floor of the Court to address the jury.

This course was accordingly pursued; and the defendant cross-examined the witnesses, (receiving suggestions from his Counsel from time to time,) and addressed the jury in person; and his Counsel were prepared to argue for him

any legal objection that might arise.

Scurlett, Adolphus, C. Phillips, and M. J. Quin, for the prosecution.

C. F. Williams, and Langslow, for the defendant.

[Attornies—Harmer, and Duncombe.]

***5501**

*MAYHEW et al. v. EAMES et al.

Notice to the principal is in law notice to all agents. Therefore, if stage-coach proprietors have given the usual 5l. notice to principals in London, in the month of January; and their traveller, who proves that he was ignorant of such notice, sends them, from Down-lam, a parcel, containing 87l., he has received for them in the month of February, by a coach belonging to these coach-proprietors, and it is lost, the coach-proprietors will not be responsible; the notice given to the principals being considered in law as notice to all their agents.

Whether the person sending a parcel, containing 871., by a stage-coach, by writing the word "Mourning" on it, does not commit such a fraud on the coach-proprietors, as to exonerate them from liability—Quare.

Assumestr against the defendants, who were proprietors of a stage-coach running from Lynn to London, for the loss of a parcel containing 871. in country bankers' notes.

The plaintiffs were mercers in London; and it appeared that, on the 10th of February, 1824, the parcel had been delivered by the traveller of the plain-tiffs to a person named Wright, who received parcels for this coach, at Downham, in the county of Norfolk, which is one stage on the road from Lynn to London, and then he put it into the coach. On the parcel there was written the word "mourning," although nothing of that kind was contained in it. It was also proved that the parcel was lost before it reached London.

Scarlett, for the defendants, objected, that the word "mourning" being written on it, was such a deception on the coach-proprietors, as to the value,

as to deprive the plaintiff of his right of action.

ABBOTT, C. J. The case had better proceed; but I will reserve the point if it should become necessary.†

[†] See the cases of Tyly v. Morrice, Carth. 485; Gibbon v. Payston, 4 Burr. 2298; and Batson v. Donovan, 4 B. & A. 21.

The defence proved was, that several times in the month of January, 1824, parcels coming by other coaches belonging to the defendants had been delivered by the defendants at the plaintiffs' house of business, and at each *of such deliveries a ticket, stating the amount of carriage, was left, con-

taining also the following notice:-

"John Eames, White Horse, Fetter Lane, whence passengers and parcels are conveyed by telegraph and other coaches to the principal sea-ports, cities, and commercial towns in the kingdom; also to the most fashionable watering places, particularly Brighton, Ramsgate, Worthing, Margate, Littlehampton, &c. Take notice, that the proprietors of carriages which set out from this office, will not hold themselves accountable for any passenger's luggage, truss, parcel, or any package whatever, above the value of five pounds, if lost or damaged, unless the same be entered as such, and paid for accordingly when delivered here or to their agents in town or country; nor will they be accountable for any glass, china, plate, watches, writings, cash, bank-notes, or jewels of any description, however small their value."

But of this notice the plaintiffs' traveller proved that he was ignorant at the

time he sent the parcel.

Denman, for the plaintiffs, objected, that this notice did not at all affect his case, because the notice, to be operative, must be given at the time the parcel is delivered to the carrier, and, therefore, deemed part of the contract; and as this notice never had been, at any time, communicated to the plaintiffs' traveller who sent the parcel, and as the contract to carry it was made with him, this notice could form no part of such contract.

ABBOTT, C. J. I am of opinion that the notice given to the plaintiffs is sufficient in this case to destroy their right of action. The traveller was their agent, and made the contract to carry solely on their behalf: and as it is so, the notice applies as much as if they had *themselves given the parcel

out to be carried. The plaintiffs must be nonsuited.

Nonsuit.

Denman, and Platt, for the plaintiffs. Scarlett, and Carrington, for the defendants.

[Attornies—Dax, and Hinrich & Stafford.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Denman now moved to set aside the nonsuit, on the ground that the notice given to the plaintiffs on the delivery of other parcels could not affect this case, as the present parcel was not sent by them, but by another person. The question turned on this, What was the contract between the plaintiffs' traveller and the defendants? If that was once made, no notice could alter it; and it was clear that the person so making it knew nothing of the notice so as to make it part of the contract; and there was no evidence of any circumstance which could induce the traveller to suspect that this was one of the defendants'

BAYLEY, J. Was there no evidence that the coach had Eames's name on it, or White Horse, Fetter Lane?

Denman. None, my Lord; and I contend that Mr. Eames cannot by a general notice exempt all the proprietors of all the coaches which may stop at his house from their common law liability. ABSOTT, C. J. I think it was brought to the plaintiffs' knowledge that the office of above five pounds value sent by their coaches; and whether they did or did not know this coach to be the defendants', it was their duty to tell all their clerks not to send

by any of the defendants' coaches, if they did not like their terms.

BAYLEY, J. The plaintiffs knew that the defendants would not be answerable for losses above a certain value, as proprietors of any coach coming to the White Horse, in Fetter Lane; and, knowing that, it was their duty to order their traveller not to send by any of Eames's coaches, and if they omitted to do so, it was at their own risk. The notice having been given to them is sufficient, without also giving it to their agent; notice to a principal being in law notice to all his agents.

HOLROYD, J. The plaintiffs bring the action on the ground that the contract was made by their agent and on their behalf, and the notice given to them was

sufficient to cover all their agents.

LITTLEDALE, J. I take it to be clear that notice to the principal is notice to the agent, and vice versa.

Rule refused.

LEE v. LEVI.

Whether, after the indorsee of a dishonored bill has brought actions against the indorser and the acceptor, his taking a cognovit of the acceptor, for payment by instalments, is such a giving time as discharges the other parties to the bill—Quare.

Assumestr by the indorsee of a bill of exchange, drawn by a person named

Jackson on a person named Byers, for 501. two months after date.

The defence was, that the plaintiff had given time to *the acceptor, Byers. However, it appeared that as soon as the bill was dishonored, the plaintiff brought actions against both the defendant and Byers, and that after both those actions were so brought, the plaintiff took a cognovit of Byers, and was to receive the amount from him by instalments of 5l. per month. This was the giving time relied on.

For the plaintiff, a witness was called to show that the detendant was privy

to that arrangement with Byers, and consenting to it.

ABBOTT, C. J., left it to the jury to say, whether the defendant had consented to the arrangement which had taken place between the plaintiff and Byers.

The jury found that he had not, and they, by his Lordship's direction, found for the defendant; his Lordship giving the plaintiff's Counsel liberty to move to enter a verdict for the plaintiff, in case the Court above should be of opinion that this was not such a giving time as would exonerate the other parties to the bill.

Brougham, and Platt, for the plaintiff. Gurney, and Chitty, for the defendant.

[Attornies—Henson, and C. Lewis.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J&

In Banc.

In the ensuing *Hilary* Term, *Brougham* moved, in pursuance of the leave given at the trial, for a rule *nisi*, for entering a verdict for the plaintiff, which was granted.

See the case of Walwyn v. St. Quintin, 1 Bos. & Pul. 652.

*ADJOURNED SITTINGS AFTER MICH. TERM, IN LONDON. [*555

BEFORE LORD CHIEF JUSTICE ABBOTT.

HARTLEY v. CASE.

Notice of the dishonor of a bill, after the bill has actually been dishonored, is good, though given on the very day on which the bill became due, though the refusal of the acceptor is only qualified, he saying that he has no effects, but expects to have them in the course of the day. Semble, that in a letter, intended as a notice of dishonor of a bill, the dishonor ought to be stated as a specific fact, and that it is not sufficient for the letter merely to demand the money of the drawer, and leave him to infer from that circumstance that it has been dishonored.

Assumpsite by the indorsee against the drawer of a bill of exchange, dated Mortlake, April 13, 1824, at four months after date, drawn by the defendant on his son for 150l. It was accepted, payable at No. 2 Upper King-street, Bloomsbury. On its presentation at that place, on the day on which it became due, the answer was, that they had no effects, but probably should have in the course of the day. On the same day, the following letter was sent to the defendant, as a notice of the dishonor of the bill:—

"London, 16th August, 1824.

"Sir,—I am desired to apply to you for payment of the sum of 1501., due to me on a draft drawn by Mr. Case on Mr. Case, which I hope you will discharge, to prevent the necessity of legal proceedings."

Signed by the plaintiff.

The defendant's Counsel objected, 1st, that this letter was no notice of dishonor; it did not state that the bill had been dishonored, it only expressed a hope that the defendant would pay it; and a notice of dishonor ought to inform the party of the dishonor as a substantive fact: and, 2d, that the notice of dishonor (if any) was premature, as it was given on the day on which the bill became due, whereas the acceptor had the whole of that day to pay it in; and that the dishonor was not a positive refusal to honor it, but, on the contrary, that they were in expectation of being able to do so.

*ABBOTT, C. J. I think the notice of dishonor was insufficient; it ought to explicitly tell the party that the bill has been dishonored, as a fact, and not leave it to be made out as matter of inference; and as the refusal

to honor the bill was not positive, the plaintiff was too soon in giving notice of the dishonor, the acceptor having the whole day to pay it in.

Nonsuit.

Scarlett, Chitty, and Holt, for the plaintiff. Brougham, and Manning, for the defendant.

[Attornies—Hartley, and Harrison.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Holt now moved to set aside the nonsuit in this case; and he argued, 1st, that the notice of dishonor was sufficient, because the notice of the dishonor of a bill need not be in any set form of words, and the use of it is only to put the drawer on his guard, and therefore any form of notice that lets him know that the drawee has failed in his engagement, is sufficient: and 2d, that the notice of dishonor, as it was given after the actual dishonor of the bill, though on the same day, was good. And he cited the judgment of Mr. Justice Buller, in the case of Leftley v. Mills, 4 T. R. 174.

ABBOTT, C. J. I think the notice of dishonor given on the day on which the bill is payable will be good or bad as the acceptor may or may not afterwards pay the bill. If he does not afterwards pay it, the notice is good; and if he does, it of course comes to nothing.

The Court granted a rule nisi on both points.

*557]

*WELBY v. DRAKE.

If one is sued on a bill of exchange, and it appear that the plaintiff has agreed with a third person that if he will advance part of the sum for the defendant, the plaintiff will take that in discharge of the whole debt, and such third person so advances it, that is a good defence to the action.

Assumest against the defendant as drawer of a bill for 181. 3s. 11d., which had been returned unaccepted.

It appeared that the plaintiff had agreed that if the defendant's father would pay him 91. he would accept it in satisfaction of the whole debt; and this sum of 91. was accordingly paid by the father.

Chitty, for the defendant, contended, that though a party himself, by paying a less sum than is due, does not discharge the debt, yet if, in consideration of a third person coming forward to pay a less sum, the creditor agrees to take it in satisfaction, and that a less sum is so paid, it cancels the debt.

ABSOTT, C. J. If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.

Verdict for the defendant.

Chitty, for the defendants.

[Attornies-Fisher & Sudlow, and Lake.]

*BLOXAM and another, assignees of HENRY and SEALY FOUDRINIER, Bankrupts, v. ELSEE.

If by a private act of Parliament a privilege of the sole making of a newly-invented machine is vested in certain persons, with a provise that it shall be forfeited in case it shall become "vested in, or in trust for, more than five persons or their representative, shall become "vested in, or in trust for, more than five persons or their representatives, otherwise than by devise or succession, (reckoning executors and administrators only as the single persons they represent:") Held, that if one of the persons becomes bankrupt, the right passes to his assignees; and that though there are more than five creditors, yet the assignees do not hold it in trust for "more than five persons, otherwise than by devise or succession," within the meaning of the act.

It being objected, that a specification, enrolled pursuant to a patent for an invention, contained French terms:—Held, that an inventor of a machine is not tied down to make such a specification, as, by words only, would enable a skilful mechanic to make the machine, but he is allowed to call in aid the drawings that he may annex to the specification; and if by a comparison of the words and the drawings, the one will explain the other sufficiently to enable a skilful mechanic to perform the work, such a specification

other sufficiently to enable a skilful mechanic to perform the work, such a specification

is sufficient.

You cannot ask a witness what the opposite party has said as to the contents of deeds exe-

cuted by him, without such party has had notice to produce such deeds.

If a servant, while in the employ of his master, makes an invention, that invention belongs to the servant and not to the master: but, semble, that if the master employs a skilful person for the express purpose of inventing, that the inventions made by him will so much belong to the master, as to enable him to take out a patent for them.

If a patent be taken out by a British subject, on a secret trust, to hold it for the benefit of

the real inventor, the patent stating that the patentee has obtained the invention from a certain foreigner; whether, if such inventor, for whom it is held, be an alien enemy at the time, that will annul the patent, without its being necessary to sue out a scire facial. for its repeal-Quare.

Acrion for the infringement of patents, by the defendant's causing to be

made a machine for the making of paper.

The first count in the declaration stated, that before the bankruptcy, to wit, on the 20th of April, 1801, his Majesty, by his letters patent, (of which profert was made,) reciting that John Gamble was in possession of a machine for making paper in single sheets, without joinings, from one to twelve feet wide, and from one to forty-five feet long, the method of making which machine had been communicated to him by a certain foreigner, and that the same would be of great utility, granted to John Gamble the exclusive sale of the machine for fourteen years. It then stated the terms of the patent, and proceeded to aver, that, in pursuance of the patent, John Gamble enrolled the specification within six calendar months. It then proceeded to state another patent granted to John *Gamble on the 7th of June, 1803, (of which profert was also made,) for certain improvements in the machine, and averred an enrolment of a specification by John Gamble, in pursuance of this patent. It then stated, that by indenture of 7th January, 1804, John Gamble assigned his interest in the patents to the bankrupts; and that in the year 1807, in consequence of the bankrupts and John Gamble having been at great expense in improving the machine, and in making models, by an act of Parliament of the 47th year of his late Majesty, (Geo. 3,) it was enacted, that the sole right of making, using, and vending these machines, should be in Gamble and the bankrupts for a term of fifteen years next ensuing; but that if the bankrupts or Gamble did not within six calendar months after the passing of the act, enrol a specification of the last improvements in the Chanceries of England, Scotland, and Ireland, that the act, and the extended term granted by it, should cease. It then proceeded to aver such enrolment accordingly; and went on to state, that by an indenture of the 19th of February, 1804, Gamble conveyed all right and interest which he derived under the act of Parliament to the bankrupts. The count went on to state the petitioning creditor's debt, trading and act of bankruptcy of Messrs. Foudrinier, the suing out of the commission, the declaring them bankrupts, and the different assignments, to show title in the plaintiffs, as assignees, and that the defendant contriving, &c., to injure the plaintiffs, as

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assignees as aforesaid, within the said term of fifteen years, to wit, on, &c., and on divers other days, &c., without the license of the plaintiffs, or either of them, and against their will, made and used a certain machine for making paper, in imitation of the said improved machine therein before mentioned, in breach of the said act of Parliament, and against the privilege of the said Henry Foudrinier, and Sealy Foudrinier, and John Gamble, so assigned to the plaintiffs, as aforesaid, &c.

The second count charged the defendant with causing a "machine for the making of paper to be made in imitation of the said improved machine.—The third count was similar, but charged the defendant's machine to be "in part imitation of the invention."—The fourth count charged it to be "in imitation."—The fifth count charged it to be "on the same principle and greatly resembling."—The sixth count charged it to be "greatly resembling."—The seventh and five following counts were similar to the preceding six, except that they stated the plaintiffs' right to be derived from the act of Parliament and the assignment from Gamble to the bankrapts, and omitted to refer to the patents.—The thirteenth count charged the defendant with the "using a machine for making paper in imitation of the improved machine."—The four-teenth count was for "using a machine in part imitation, and greatly resembling," &c.—The fifteenth count was for using a machine "in imitation and greatly

resembling," &c. Plea-General issue. On the part of the plaintiffs, the two patents were produced; one dated 20th April, 1801, and the other 7th June, 1803, and the specifications thereon duly enrolled; and a private act of Parliament (which was to be deemed a public act) of 47 Geo. 3, Sess. 2, c. 131, which recited the different patents and specifications, and the assignments of the patents, and that Gamble and the bankrupts had been put to great expense, and had made further improvements; and proceeded to enact, (s. 1,) that Messrs. Foudrinier and Gamble, and their assigns, should, for fifteen years from thenceforth, make and use the improved machine, and that no other person should "make, use, or vend the said intproved machine, or in any wise counterfeit, imitate, or resemble the same, without the license of the said H. and S. Foudrinier and John Gamble," or their executors, administrators, or assigns, in writing, under their hands and seals, first had and obtained, under the penalties that can be inflicted for contempt of this act, and further to be answerable in damages to Henry *and Sealy Foudrinier and John Gamble, their executors, &c. The act then proceeds to fix rates of charge at which licenses shall be granted; and by s. 5 it is enacted, that they, or one of them, shall, within six calendar months, enrol specifications of the present improved state of the machine in the Chanceries of England, Scotland, and Ireland, otherwise the advantages of the act to cease; and the party or parties executing the specification, may make use of such words, figures, delineations, and explanations, as are proper for welldescribing the invention, although they are not the same words, &c., as are used in the former specifications. Section 6 enacts, that all objection to the specifications shall be of the like force and effect as they would have been if this act had not passed, "and if also the specifications to be enrolled as required by this act had been in due time enrolled instead of the said former specifications respectively, except only as to the extension of the said privileges for the further term of years hereby granted." Section 7. Provided always, that if at any time during the term the said Henry Foudrinier, Sealy Foudrinier, and John Gamble, or any person who shall have or claim any right, title, or interest, in law or equity, in the said privilege, shall make any transfer or assignment of the privilege, or any shares of the benefits or profits, or shall declare any trusts to or for any number of persons exceeding the number of five, or if they shall open books for public subscriptions, or presume to act as a corporate body, or do any thing contrary to the statute 6 Geo. 1, c. 18, (commonly called the Bubble Act;) "or in case the said power, privilege, or authority shall at

any time become vested in, or in trust for, more than five persons or their representatives, at any one time, otherwise than by devise or succession, (reckoning executors and administrators as and for the single persons they represent, as to such interest as they are or shall be entitled to in right of such their testator or intestate,) that then, and in every of the said cases, all liberties and advantages whatsoever, *hereby vested in the said Henry Foudrinier, and John Gamble, their executors, administrators, and assigns, shall utterly cease, determine, and become void, any thing herein before contained to the contrary notwithstanding."—The specifications under this act were read. The formal proofs of the bankruptcy and of the plaintiffs' title being given, and it being also preved that there were more than twenty

creditors of the estate of the bankrupts—

Scarlett objected, that by the assignees having the privilege in question as signed to them in trust for more than five persons, the whole thing was at an end, as by the 6th section of the act above cited, if the privilege became "ventea in, or in trust for, more than five persons, otherwise than by devise or suceession," the whole privilege was to be at an end. Now the property had become vested in the assignees in trust for more than twenty creditors; and this being a private act of Parliament, which is to be considered only in the light of a conveyance, the parties must take it with all its imperfections; and the only two cases in which the Legislature have allowed it to be held by or for more than five persons are pointed out, and this is not either of them: and unless the words "otherwise than by devise or succession" are to be considered as surplusage, the construction contended for must prevail. if the assignees had the right, they cannot carry on trade, their trust being to make a dividend of the bankrupt's estate: and could it be contended, that if there were one hundred creditors, each might by his own authority grant licenses to paper-makers to use these machines?

ABBOTT, C. J. The creditors could not do so, but the assignees might.

Brougham, and Alderson, on the same side, cited the *case of [*563]

Hesse v. Stephenson, 3 Bos. & Pul. 578, and adverted to the judgment

of Lord Alvanley in that case.

ABBOTT, C. J. Whether Lord Alvanley entertained any doubt on this point I cannot tell; but I entertain none: and I am clearly of opinion that the

privilege passes to the assignees.

Mr. Brunel, Mr. Bramuh, and several other eminent engineers, proved that from the last specification under the act of Parliament, and the drawings annexed to it, any skilful mechanic might make the machine. In the first specification, they said, there was some little obscurity, and it had several Gallicisms in it: the French word vice for a screw; vice de pression for an adjusting screw; and in one part there was to be an acclivity of two centimetres; a centimetre being a hundredth part of the French metre, and .3913 parts of an English inch, the French metre being 39.13 inches English measure. All this would not be understood by English mechanics; but still, from the drawings annexed to either of the specifications, skilful mechanics could make the machine.

Mr. John Gamble proved that he obtained his knowledge of the original invention from M. Leger Didot, who was a Frenchman.

In cross-examination, Scarlett asked him—"Do you not know from Messrs. Foudrinier, that, by deeds passing between Didot and them, Didot retained

some interest in the patent?

ABBOTT, C. J. I overrule that question; for I hold that you cannot ask a witness what a plaintiff has said as to the contents of deeds executed by such plaintiff, without giving such plaintiff notice to produce the deeds, or accounting for their non-production.

*However, Mr. Gamble afterwards stated, that, at the taking out of the original patent in April, 1801, he was acting as a trustee for Didot;

and that, at that time, this country was at war with France. (It being just before the peace of Amiens.)

Searlett objected that the patent was void, being held in trust for an alien

ABSOTT, C. J. I shall reserve that point.

The defence was, 1st, that the first specification was bad, on account of the Gallicisms contained in it, and of the obscurities in it; and, 2d, that the improvements mentioned in the last specification were the invention of Mr. Donkin: and on the 2d point, Mr. Donkin proved that those, improvements were of his invention; but he stated, that at the time he invented those improvements he was employed by Messrs. Foudrinier and Gamble as an engineer, for the purpose of bringing the machine to perfection, and was paid by them for so doing, and, therefore, he was acting as their servant for the purpose of suggesting improvements in the machine.

The Attorney General, in reply, contended that these were the patentees' inventions, and that Mr. Donkin was employed by them to carry their ideas

into effect in the best manner.

ABBOTT, C. J. An inventor of a machine is not tied down to make such a specification, as, by words only, would enable a skilful mechanic to make the machine, but he is to be allowed to call in aid the drawings which he annexes to the specification; and if, by a comparison of the words and the drawings. the one will explain the other sufficiently to enable a skilful mechanic to perform the *work, such a specification is sufficient. His Lordship then set it to the jury to say, whether it was an useful invention, and whether the defendant had infringed the patent by using the machine. His Lordship also observed, that by the 6th section of the act, the third specification was to be taken as a substitute for the former specifications, and if good, (which it was,) that would remedy all defects and omissions in the former ones.

Verdict for the plaintiffs, with liberty to move to enter a nonsuit. The Attorney General, Marryatt, Gurney, Curwood, and Tindal, for the

Scarlett, Brougham, and Alderson, for the defendant.

[Attornies—Elison & Bloxam, and Swaine & Co.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Scarlett now moved for a nonsuit or a new trial. He stated his first ground to be, that Gamble took out the first patent for Leger Didot, who was at that time an alien enemy, and that fact not being disclosed at the time of the taking out of the patent, it was a fraud on the Crown.

ABBOTT. C. J. We all think this a point worthy of consideration.

Scarlett. The second point is, that this privilege could not be assigned for the benefit of more than five persons, under the seventh section of the private act of Parliament.

*BAYLEY, J. Does not the act state that the right shall not be vested in more than five persons or their representatives?

Scarlett. Yes, my Lord; and that it shall not be held in trust for more than five persons. Now the assignees are trustees for the whole body of creditors, and in many respects the assignees do not represent the bankrupt: and the act goes on to add, "otherwise than by devise or succession;" and i", under these words, the right passed to the assignees, it would be a great question, whether the assignees could carry on a trade for the benefit of a large body of creditors. The only case on this subject is Hesse v. Stephenson,

Abbott, C. J. What do you understand by the words, "or succession?"

Scarlett. Upon the rule noscitur a sociis, and being taken with the words "devise" and "executors and administrators," it must be taken to mean coming in as an administrator by succession, in contradistinction from coming in by devise as executor.

ABBOTT, C. J. Looking at the words of the private act, and the reference to the 6th Geo. 1, and construing the whole of the objects of the Legislature together, I am of opinion that this clause only applies to such assignments as are the act of the party, and does not apply to assignments by act of law. Under the Registry Acts, assignments are to be notified in a particular way; and the words of those acts are as clear as they possibly can be, but it was never thought that they extended to the assignees of a bankrupt.

BAYLEY, J. This right may go to five persons or their representatives. It was in Messrs. Fourinier, who were *under the limited number five, and it passed by a statutable assignment to the assignees, who are their representatives.

HOLROYD, J. I shink that the assignees are the representatives of the bank-rupts, and that the j may sell the right for the benefit of the estate.

LITTLEDALE, J. I am of the same opinion.

Scarlett. Another thing to be observed is, that the first patent was for a machine to make paper from one to twelve feet wide; now it appeared from the evidence, that, without considerable alterations, the same identical machine could not make paper of both those widths, and therefore that patent fails, as the machine will not perform what it professed to do, and if the first patent fails, I contend the whole case fails with it. Another head of objection is, that four out of five of the improvements mentioned in the second specification, were invented by Mr. Donkin. For the plaintiffs it was contended that he was paid to improve the machine, and therefore, for that purpose, he was acting as the servant of Messrs. Foudrinier; but if that were so, he was not at all the servant of Gamble, and yet Gamble was one of the persons who took out the patent for those very improvements. But I further contend, that if a servant makes an invention, such invention is the property of the servant, and not of the master; but I admit that if the master plans, and the servant only executes what his master has planned, the invention belongs to the master. In the case of Barber v. Walduck, tried at Lancaster in the summer of 1823, before Mr. Justice Holroyd, which was an action for the infringement of a patent, for an improved manner of making hats, the plaintiffs were hat manufacturers, and the plaintiffs' Counsel opened a strong case; but his first witness, who was one of the plaintiffs' men, proving that he invented the *improvement, [*568 which was the subject of the patent, while employed in the workshop of the plaintiffs; the learned Judge directed a nonsuit.

BAYLEY, J. Was that person employed by them for the express purpose of devising improvements?

Scarlett. I believe not, my Lord: but, at any rate, Mr. Donkin was not acting as the servant of Gamble, who is one of the patentees, but of the Foudriniers only; and, besides this, the fifth supposed improvement, which was not of Mr. Donkin's invention, is proved to be no improvement at all; and if one of several improvements, for which a patent is taken out, is useless, the whole patent fails.

Abbott, C. J. My present doubt is, whether, by the latter part of the sixth section of the private act, the defects (if any) of the earlier specifications are not aided.

BAYLEY, J. In the case of *Hill* v. *Thompson*, 8 Taunt. 395, it is laid down, that if a servant make an improvement, his master is not entitled to take out a

patent for it.

Scarlett. I have further to object, that the first specification is bad, because there are several words in it not English; such as vice de pression, vice de repulsion, and vice de reaction, for different screws; and the French word chapitre for a cap also occurred; it was however proved, that, from the drawings annexed to this specification, a skilful mechanic might make the machine, but I submit that, as a specification could not be made by drawings alone, it must be made in apt words, intelligible to mechanics; and if this specification were held good, every thing mentioned in a specification might be called by a wrong name, and drawings referred to for the whole. Even the scale appended to the drawings was a scale of pieds and pouces, terms unknown to English mechanics.

*ABBOTT, C. J. But it was proved that the names to the scale were quite immaterial; for relative proportion, which was all that was wanted, the scale would have been as good if there had been no names at all.

Scarlett. If any part of the specification is bad the whole is so.

ABBOTT, C. J., said that some of the points deserved serious consideration;

The Court granted a rule nisi for a nonsuit or a new trial.

The National Bank of St. Charles v. DE BERNALES.

A corporation in a foreign country may sue as such in the Courts of this country, but they must prove that they are incorporated in that country; and it will be left to the jury to say, whether the body so incorporated is the same which sues.

Assumper on a bill of exchange, and for money had and received.

The plaintiffs were the National Bank of St. Charles, in the kingdom of Spain, and now sued in their corporate capacity.† Letters of the defendant were put in and read, in which he admitted that he held in his hands a sum of 19,000l., the property of this bank.

*A witness produced a copy of the charter of the King of Spain incorporating this bank. The witness stated, that he procured this copy from the office of the Council of Castile, which is the proper place for charters of this kind to be kept, and that he examined this copy with the original char-

ter. A translation of the charter was proved and put in.

The Attorney General objected, that the plaintiffs declared as the National Bank of St. Charles, whereas the King of Spain, by his charter, gives them the name of the Bank of St. Charles. If this were an English corporation, they could only sue by their corporate name given them by their charter, and which name they had no power to alter.

† In the case of The Datch West India Company v. Van Moses, 1 Str. 613, it was held, that a corporation in a foreign country might sue in our Courts by their corporate name; the jury finding that the company suing were the same company that lent the money sued for in that case. The action was brought in the Court of Common Pleas, and the judgment of that Court is reported by Sir John Strange, but it was afterwards removed by write ferror into the King's Bench, and ultimately to the House of Lords; and in each Court the decision of the Court of Common Pleas was affirmed, that a foreign corporation could see as such in this country, 2 Ld. Raym. 1532; and in that report it is stated, ex relat. Lord Chancellor King, (who had tried the cause,) that at the trial he held the company to prove, by proper evidence, that they were an authorised company in their own country. In the present case I have stated the evidence that was adduced on this subject.

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Scarlett, contra. The learned Attorney General's statement is not quite accurate; as the King of Spain appoints this bank to be a national bank, and afterwards calls them The "National Bank of St. Charles;" and if they had misnamed themselves, it could be only taken advantage of on plea in abatement, as was held in the case of The Corporation of Stafford, in the notes to the case of Mellor v. Speghtman, 1 Paties. Saund. 340;† and besides this, the defendant in his own letters addresses them as the National Bank of St. Charles.

ABBOTT, C. J.—I will ask the jury whether this is the same bank that was

incorporated by the King of Spain.

The jury answered this question in the affirmative.

Verdict for the plaintiff.

Scarlett, Parke, and Kaye, for the plaintiffs.

Attorney-General, Koe, and Patieson, for the defendant.

[Attornies-Freshfield & Kaye, and ----.]

† The case of The Mayer and Burgesses of Staferd v. Bolton, is reported in 1 Bos. & Pul. 40; it was an action for tolls, and the plaintiffs sued as a body, incorporated by the name of "The Mayer and Burgesses of the Borough of Staferd;" but at the trial they put in a charter of 12 Jac. 1, which incorporated them by the name of "The Mayer and Burgesses of the Borough of Staferd in the County of Staferd;" and the Court held, that this misnomer could only be taken advantage of by plea in abatement. In Bro. Abr. tit. Misnomer, 73, it is laid down, "En action per corporation ou natural corps misnosmer de I'an ou l'autre ne va mes al brief, mes adire que nul tiel person in rerum natura, ou nul tiel corps politique, ceo est in barre car sil soit misnosme il poit aver novel brief per le droit nosme; mes si ne soit tiel corps politique, ou tiel person donques il ne poit aver action." And in the Year Book, 22 Edw. 4, 34, which was an assize by the "Master and Brethren of the Fraternity of the Nine Orders of Angels," in Bransford in the county of Middlesex, it was pleaded in abatement that they were incorporated by the name of the Master and Brethren of the Fraternity of All Saints and the Nine Orders of Angels, and the assize was abated.

'COURT OF COMMON PLEAS. [*578

SECOND SITTINGS IN LONDON IN MICH. TERM, 1824.

BEFORE LORD CHIEF JUSTICE BEST.

ELBOURN v. UPJOHN.

In the declaration in an action to recover the price of goods sent for sale on commission allege that the defendant sold but did not account to the plaintiff, the plaintiff must prove that a sale actually took place; and it will not be presumed even at a distance of twelve months after the delivery of the goods.

This case was opened as an action for goods sold, and money had and received.—It was to recover the value of some turkies sent by the plaintiff to the defendant.

Witnesses were called, who proved the delivery of the turkies to the defendant; but, on their cross-examination, it appeared that the plaintiff was a

breeder of turkies, and sent them to the defendant, who was a poulterer, for the purpose of their being sold on commission.

Wilde, Serjt., for the defendant, upon this went for a nonsuit, contending

that there was clearly no case of goods sold.

Vaughan, Serjt., for the plaintiff, replied, that there was no ground of nonsuit, because there was a special count in the declaration, charging the defendant with not having accounted, which he ought to have done.

BEST, C. J. Although this count was not originally opened, I will allow

you to go into the question upon it.

This count was then read. It stated, that, in consideration that the plaintiff would deliver to the defendant the goods in question, the defendant promised to sell them for him and account to him, and that, although he afterwards sold them, he had not rendered to the plaintiff a just and true account of the sale.

BEST, C. J., upon this, held that evidence must be given of the defendant's

having actually sold.

Vaughan, Serjt., and E. Lawes, argued, that, at such a distance of time, (it being nearly twelve months since the delivery,) a sale ought to be presumed, and the value of the turkies considered as money had and received by the defendant to the use of the plaintiff, unless the defendant could show that he had not sold, which it would be much easier for him to do than for the plaintiff to show that he had

BEST, C. J. I think on the part of the plaintiff you must give some evidence of the sale. You perhaps need not have tied yourself down by such an averment as this, but, having done so, you are bound to prove it.

The plaintiff was then nonsuited.

Vaughan, Serjt., and E. Lawes, for the plaintiff. Wilde, Serjt., and Comyn, for the defendant

[Attornies-Ewington, and Forster.]

In the same Term, Vaughan, Serjt., moved for a new trial, but the Court refused his application.

•674] •ADJOURNED SITTINGS AFTER MICHAELMAS TERM, AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE BEST.

STEED v. HENLEY.

An apothecary who furnishes medicines, and brings an action for the price of them, not being in a capacity to recover under the 55th Geo. 3, c. 194, cannot recover even for the phials in which the medicines were contained.

Action on an apothecary's bill.

Proof was given of the furnishing of the medicines for which the claim was made, and ? witness was called to show that the plaint if had acted as an

apothecary previous to the 15th August, 1815, to entitle him to recover under the statute 55 Geo. 3, c. 194, s. 21; but this witness only proved the sending four bottles of medicine to his wife, and some attendances "in a friendly way" upon his son, for neither of which was any payment made, and this was all the practice proved before the 15th August, 1815. The witness also admitted that there were at that time no drugs upon the plaintiff's premises, but only some cupping and other instruments.—A certificate from the College of Surgeons, proving that the plaintiff had passed his examinations there, was put in

Wilde, Serjt., for the defendant, contended that none of the proof adduced

gave the plaintiff any character in which he might recover.

BEST, C. J., was of the same opinion.

Pell, Serjt., for the plaintiff, then contended, that, at least, he was entitled to

recover for the phials in which the medicine had been sent.

BEST, C. J. I am clearly of opinion that the plaintiff is not entitled to recover even for the phials. Without the assistance of the act of Parliament, I should be of the opinion that, as he acted illegally in practising, and the phials were delivered in the course of such illegal practice, he cannot secover for them. For I take it to be clear, as a general principle, that, where the law directs a man not to do a thing, and he, notwithstanding, does it, he cannot recover for any thing that takes place in the course of his doing it. But in this case, in addition to the general principle, there are the words of the statute clearly decisive against such claim, for the terms used are, that the party shall not recover "any charges."

Nonsuit.

Pell, Serjt., and Adolphus, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies-E. Jones, and Sherwin.]

See the cases of Brown v. Robinson, ante, 264; Walmisley v. Abbot, ante, 309; and the notes to the latter case.

WALLACE v. WOODGATE.

A stable keeper, by special agreement, may acquire a lies on horses for their keep; and if the owner, to defeat such lies, gets them away by fraud, the stable keeper has a right to get possession of them, and for so doing he will not be answerable in trover; for the lies is not put an end to by the parting with the possession under such circumstances.

TROVER for two horses. Plea—Not guilty. The plaintiff was stated to be an officer in the army; the defendant was a livery-stable keeper. The defendant sold two horses to the plaintiff, who gave him bills of exchange for the price. Before the bills were due, the defendant, having a suspicion that they were not likely to be honored, went to the plaintiff and asked him to take *them back and give up his property in the horses. They were then at livery in the defendant's stables, and a bill of charges had been proposition. The defendant afterwards saw the plaintiff again, who, in the course of conversation, said, that the horses should not be taken away "till they were paid for." However, after this, he sent his servant to the stables to fetch them, on the pretence that he wanted to take a ride, and would send them back at night. But he did not return them; and the defendant, finding they were gone, west

after them, and having discovered them, told the person at whose stables they were, that he had been swindled out of them, and he was allowed to take them

away. This was the conversion complained of.

Tuddy, Scrit., for the defendant, admitted that a stable keeper could not, in general, like an innkeeper, detain horses for their keep; but he contended that the evidence in this case showed a special agreement which created a lien, and the plaintiff having, to defeat such lien, obtained fraudulent possession of the horses, the defendant had a right to re-possess himself of them.

Vaughan, Serit., for the plaintiff, replied, that whenever the possession was parted with, no matter under what circumstances, the lien was at an end, and could not afterwards be relied on to justify any subsequent seizure. He argued, also, that the plaintiff's saying he would not take away the horses till they were paid for, meant that he would not remove them till the price of their pur-

chase was paid, and not the bill for their keep.

BEST, C. J., left it to the jury to say, whether the plaintiff, by his statement, meant to give the defendant a lien on the horses for their keep, and whether, if he did so, he fraudulently took them away in order to destroy that

*577] lien; stating it to be his opinion, that, under those circumstances, *the
defendant had a right to re-possess himself of them, and would be entitled to their verdict in his favor.

The jury found for the defendant.

Vaughan, Serjt., and Steer, for the plaintiff. Taddy, Serjt., for the defendant.

[Attornies—C. Lewis, and Harmer.]

MASH v. SMITH et al.

A defendant in trespass, who has suffered judgment to go by default, is not a competent witness for other defendants in the same action who have pleaded, if the jury have to assess the damages against him, as well as to try the issue as to the other defendants.

Trespass against three defendants. One of them, named Mead, had suffered judgment to go by default. He was called by Vaughan, Serjt., as a witness for his co-defendants.

Pell, Serjt., objected. He stands as one of the defendants, and is not a competent witness. The circumstance of letting judgment go by default does

not put him in a different situation.

Vaughan, Serit. If the verdict passes for my clients who have pleaded, how can the party I call as a witness be benefited by it? it is no release of costs-no ground in arrest of judgment. And he cited Ward v. Haydon, 2 Esp. 552,† and Chapman v. Graves,† mentioned in a note to Stevens v. Lynch, 2 Camp. 333.

† Is the case of Ward v. Haydon, it was ruled, that where one defendant in a joint action has let judgment go by default, and the other has pleaded, the defendant who has suffered judgment by default is a competent witness for the other defendant who has pleaded. That was an action of trover for the carriage part of a cheise, tried before Lord Kenyon.

It is said in the case of Chapman v. Graves, (which was tried before Le Blanc, J.) that, "in an action of trespuss, a co-trespasser not sued, is a competent witness for the plaintiff; but if one of several defendants allow judgment to go by default, he is not a competent witness for the plaintiff, although he is for his co-defendants.

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*BEST, C. J. The jury are brought here to-day to do two things—to try the issues joined and to assess the damages. Now, if this man's evidence is admitted to give a complexion to the case, it may go to reduce the damages against him, and therefore I am of opinion that he is clearly interested and ought not to be received. But as my Lord Kenyon and Mr. J. Le Blane seem to have taken a different view of the subject, I think it will be best to receive the witness, and give leave for a motion to the Court upon the point, if the result of the case should make it material.

Pell, Serjt., and Chitty, for the plaintiff.

Vaughan, Serjt., and Burton, for the defendants.

[Attornies-Gray, and Kirkman & R.]

BURNAND et al. v. NEROT.

That part of the statute of frauds, which directs certain agreements to be in writing, will be taken notice of by the Court, in the trial of an issue out of the Court of Chancery; however, if the jury should think that there was an agreement made, which was not in writing, the Judge will indorse that finding on the postea, as special matter. Office copies are not evidence on the trial of such an issue, though they were used in the Court of Equity.

In this case two issues directed by the Vice Chancellor were to be tried. The one was—Whether in the year 1804, there was any agreement between the defendant and his sister, Mrs. Burnand, then Miss Nerot, for the sale by him to her of his share and interest in the lease or term of years, good-will, household furniture, plate, linen, and china, in a house in King-street called Nerot's Hotel?—The other issue was—Whether there was any agreement by which the defendant was to have a certain portion of cash, and his sister a certain quantity of wine and coals which were on the premises! The Vice Chancellor had ordered that the parties should be both examined at the trial of the issues; and the case for the plaintiff depended chiefly on the evidence of Mrs. Burnand, as that of the defendant did materially upon his own. A valuation of the lease, good-will, &c., was made between her and her brother, which she stated was previous to her purchasing, but which he explained as being merely made to ascertain what the property at the hotel was worth previous to his quitting England.

Pell, Serjt., for the defence, contended that the statute of frauds applied to this case, there being no agreement in writing. He also went to the credit of Mrs. Burnand, and called several witnesses to contradict her. He also proposed, for the same purpose, to read an office copy of her answer in Chancery,

which office copy was used in the Court of the Vice Chancellor.

BEST, C. J. I am afraid that is not evidence.

Pell, Serjt. I will tell your Lordship why I think it is. I grant that in ordinary cases an examined copy is necessary; but I take the distinction to be this—an office copy is evidence in the same cause, between the same parties, in the same Court. Now this is clearly the same cause, and between the same parties, and I submit, also, that it is in the same Court, as, notwithstanding the dignity of this Court in general, it is, pro hac vice, only a tribunal assisting the Vice Chancellor in the determination of a particular question, by telling him the opinion of a jury upon it, under the direction of a Common Law [*580]

Vaughan, Serjt., intimated that, inasmuch as before the Vice Chancellor it might subject him to a motion for a new trial, on the part of the plaintiff he

thought it would be best for him to waive his right to object.

Best, C. J. If the objection is not waived, I am bound to say, that I cannot get over it. They must go a great deal further. To affect the witness, they must prove the identity of the party who makes the answer, which they cannot do by merely putting in the office copy. I have been looking into the subject, and I can find no exception to the general rule, that an examined copy must be put in. I cannot agree that one of his Majesty's supreme Courts is to be considered as merely an auxiliary to the Court of the Vice Chancellor.

The objection was then formally waived, and the answer was read; and several witnesses were called, who contradicted Mrs. Burnand's testimony.

Vaughan, Serit., in reply, observed, that, as to the point raised on the statute of frauds, the Vice Chancellor merely sent the issues to the Court of Common Pleas, for information as to the matter of fact, whether the parties intended the one to transfer and the other to take the interest in the premises, &c., in ques-

tion. The statute, therefore, did not apply.

BEST, C. J. I am bound, sitting in a Court of Law, to take notice of the statute of frauds. I am aware that in the Court of Chancery a different rule prevails. The Court of Chancery is bound by the statute of frauds thus far :-The party may make the objection, but I believe if he does not, but answers to the bill, the Court will say, *you have not put yourself on the statute, and cannot, therefore, avail yourself of it. The statute mentions an

agreement for a lease; and it has been decided that if one part of an agreement is void as within the statute, an auxiliary agreement is void too. Therefore, I think, in this case, the verdict should be for the defendant at all events. But if the jury should be of opinion that Mrs. Burnand is entitled to credit, then they may find that there was an agreement, though not reduced into writing, and that, as special matter, may be indorsed on the postea. His Lordship made no remark as to the effect of the valuation.

The verdict was for the defendant on both issues.

Vaughan, Serjt., and C. Cresswell, for the plaintiffs. Pell, Serit., F. Pollock, and Barber, for the defendant.

[Attornies—Flexney, and Stevens.]

In the Court of Chancery it is the constant practice to read office copies of Chancery proceedings in evidence, without their having been examined by the witness who produces them. On trials at Law, office copies are never admitted in evidence, examined copies only being allowed; and on issues, the practice is to try them precisely in the same way as any other trial at Law, except in such particulars as are specially directed by the Equity Judge in his order directing the issue, such as for a party to be examined, or the like.

*582] *SINCLAIR v. STEVENSON.

If there are parol negotiations, which are afterwards reduced into writing, the writing must be looked to as showing the final arrangement. But when a question arises as to whether a transaction has an usurious character, questions may be put to ascertain whether other matters, which do not appear on the face of it, were not previously talked of.

If a paper be put into the hands of a witness to refresh his memory, the Counsel on the opposite side have a right to see it; but if it is merely given to him to prove a handwriting to it, they have not.

If a creditor of a bankrupt agrees to release the estate, on an undertaking by one of the

assignees to pay him what should appear to be justly due, he is a competent witness on the part of the assignees.

If a paper be traced to the hands of the agent of a party in a suit, and notice has been given to such party to produce it, he is bound to do so, and the other side are not bound to call the agent. And if he has delivered it to the stamp-office to get certain duties allowed, and does not tell the party serving the notice to produce, of that circumstance, parol evidence of the contents may be given.

TROVER, by the assignee of a bankrupt, to recover possession of a distillery plant, which, it was alleged, was either the property of the bankrupt by purchase, or in his apparent order and disposition at the time of his act of bank-

It was opened that a question would arise as to whether an instrument, which appeared to have been prepared in consequence of certain negotiations in the form of a lease, did not, in reality, evidence a purchase to be paid for by

instalments, with usurious interest.

The bankrupt was examined; and was asked by Pell, Serjt., as to some negotiations about the plant in question. It appeared that they were at first

verbal, but were afterwards reduced into writing.

BEST, C. J., upon this observed—It has been decided lately, that if there are negotiations, which, at first, are merely parol, but are afterwards reduced into writing, we must look to the writing as showing the final arrangement. But, in such a case as this, I will allow questions afterwards to be put, to ascertain whether other matters were not previously mentioned, besides those which were eventually reduced into writing.

A paper was about to be put into the hands of another witness, to enable

him to explain some part of his evidence, when-

*Pell, Serjt., asked to see it.

[*58**3**

Vaughan, Serit., contended that he had no right to see it unless it should be put in evidence.

BEST, C. J. If you put a paper into the hands of a witness in order to refresh his memory, the other side have a right to see it: if you merely give it

him to prove a handwriting, they have not such right.

The same witness afterwards appeared to be a creditor of the bankrupt: he was therefore objected to. But upon being asked, whether he would release the estate, on the plaintiff Sinclair, one of the assignees, undertaking to pay him what should appear to be justly due to him, he replied in the affirmative. -A release was then prepared, by which the witness, in consideration of a promise by Sinclair to pay him what should be found justly due, released all claims on the estate, and Sinclair, in consideration of such release, made the promise required.

Vaughan, Serjt., objected. It must be an absolute release, not one, as this

is, containing a fresh cause of action.

BEST, C. J. If the witness will take it, I shall receive him.

Wilde, Serjt. This will not be sufficient; the assignee will have a claim on the estate for this money, and the witness comes to increase, by his evidence, the funds out of which the assignee is to receive it. A promise from a plaintiff to pay a debt never was held sufficient if the debt was still in existence. The witness is not sufficiently removed from all the security of the fund to make him competent.

He is a witness. By the claim of the assignee on *В**к**ет, С. J. the fund his interest is not affected. The assignee must pay the money whether he gets it again from the estate or not. The witness gives up his claim to the estate and looks only to the assignee, and that is quite sufficient.

An engrossment of a deed, which was not executed, was proved to have been produced by one Smallwood, who was the defendant's agent, at a meeting between him and the bankrupt, and to have been left, after it had been read, in the hands of Smallwood.

Pell, Serjt., called for its production, notice to produce having been given to the defendant's attorney.

Vaughan, Serjt., said that he had it not.

Pell, Serjt., was then proceeding to give parol evidence of its contents, when Wilde, Serjt., objected. We have two answers to the call for the production of the deed: the first is, that we have not got it, and the next is, that Smallwood may be called to produce it.

Bret, C. J. Smallwood is your agent.

Wilde, Serjt. But notice has only been given to the principal, and that will not do; they must show that it got out of the hands of the agent. I will adduce

evidence to show that we have it not in our custody.

BEST, C. J. Unless you do give such evidence, I am of opinion that you must produce it. 'If the deed is traced to your agent, that is enough. They *585] need not call *Smallwood. But if you account for its not being in his

custody, that may vary it.

A witness proved that the engrossment was, in the usual course of their business, delivered to the law stationers, in the month of December or January, to get the stamps on it allowed at the stamp-office, because it had not been

BEST, C. J. Then it is in the control of the defendant?

The witness was then asked, but could not say, what is done with any instrument after it goes to the stamp-office to get the amount of the stamps returned.

Pell, Serjt. It either is or is not in existence. If it is, they are the proper persons to get it back again; if it is not, we may give evidence of the contents. If it is in the custody of the stamp-office, there are no means of compelling the commissioners to produce it. These persons are the owners of the instrument.

Vaughan, Serit. There is no reason to presume that the officers of the Revenue will not produce the instrument, or, at least, show what has been done with it, whether it is destroyed or not. In most offices there is a certain time during which papers are kept. This instrument, in the course of business, is naturally to be found at the stamp-office, and no inquiry has been made there for it, Possession is the very foundation of notice; and I allow that if there were reasonable evidence of possession on our part, and we did not produce the instrument, parol evidence might be given. But the evidence is quite the other way.

The case is new, but I am of opinion, on the common sense BEST, C. J. of the thing, that when one party has notice *to produce a particular instrument, and does not say that he has it not, but has delivered it to the stamp-office, the other party ought to be allowed to give parol evidence of

the contents.

It subsequently appeared that the notice to produce had not been served in

time, and the matter was disposed of on that ground. Pell, Serjt., and F. Pollock, for the plaintiff. Vaughan and Wilde, Serjts., for the defendant.

[Attornies—M' Dougall, and Nettleship.]

ADJOURNED SITTINGS AFTER MICH. TERM, AT GUILDHALL.

BEFORE LORD CHIEF JUSTICE BEST.

SEAMAN v. PRICE.

Proof that a conveyance was executed to a person named by the defendant, will support an averment in a declaration that he himself "became the purchaser."

ASSUMPSIT.

The declaration stated, that the plaintiff had bargained and agreed with one *Emanuel* for the purchase of certain freehold houses, and that the defendant was desirous of becoming the purchaser of them instead of the plaintiff; and, in consideration that the plaintiff would give up the bargain, and suffer the defendant to become the purchaser, the defendant agreed to pay the sum of 40l. It then alleged, that the plaintiff did give up the bargain, and permit and suffer the defendant to become, and the defendant did become, the purchaser, and obtained a conveyance. From the evidence, it appeared that the contract was as *stated in the declaration, but the conveyance was not executed to the [*587] defendant himself, but to a Mrs. *Price*.

Pell, Serjt., went for a nonsuit; contending, that this evidence did not support the declaration, as it was alleged that the defendant himself became the purchaser, whereas the evidence was of a conveyance executed, not to him,

but to a Mrs. Price.

BEST, C. J.—I am of opinion that the declaration is supported. If *Emanuel* had refused to convey, the 40*l*. need not be paid; but he has conveyed, and although not to the defendant, yet to his nominee, and the defendant has had the benefit of the arrangement.

Verdict for the plaintiff.

Vaughan, Serjt., and Talfourd, for the plaintiff. Pell, Serjt., and Barstow, for the defendant.

[Attornies—Hudson, and Greenfield.]

DOWLING v. FINIGAN.

If, after a witness for the defendant has been examined as to a conversation which he put down in writing, and has not been asked to produce the memorandum, and the plaintiff's Counsel, in reply, has observed upon its absence, the Judge, for his own satisfaction, asks the witness for the paper, and it is produced, such production will not entitle the plaintiff's Counsel to address the jury again on it.

Use and occupation. On the part of the defendant, two witnesses were called to give evidence of a conversation between him and the plaintiff, which conversation they had both put down in writing. The first was asked by the defendant's Counsel to produce his memorandum, but he had not got it with

*him. The second was not asked any question as to whether he had his or not.

Wilde, Serjt., for the plaintiff, in reply, observed upon the absence of the

papers, and after he had concluded his address-

BEST, C. J., called up the second witness, and asked if he had got his paper with him. The witness replied in the affirmative, and handed it up to his Lordship, who inspected and passed it to Wilde, Serjt., telling him that he should have it read or not, just as he thought proper.

Wilde, Serjt., replied that he had no wish upon the subject; but submitted that, as by the production of the paper the complexion of the case had been materially changed, he ought to be allowed to address the jury upon it as a

fresh piece of evidence.

BEST, C. J. Either party might have called for it; neither have thought proper to do so; and it is for the satisfying of the conscience of the Judge that it is asked for now. I never knew of any Counsel making a second speech on such an occasion.

Wilde, Serjt., I submit that it is the duty of a plaintiff's Counsel to observe upon all the evidence in the cause, through whatever means that evidence is

miroduced.

BEST, C. J. I cannot allow it; I should be subverting the practice of the Court.

Verdict for the defendant.

Wilde, Serjt., and Abraham, for the plaintiff. Pell, Serjt., and E. Lawes, for the defendant.

[Attornies—Burnley & A., and West.]

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*RUMBALL v. WRIGHT.

In an action on an agreement for not accepting a lease, if it appear that there was a person who had an interest in the premises, and it be not proved at the trial that such person was a party to the lease tendered, the plaintiff cannot recover. Neither, under such circumstances, is he entitled to recover for use and occupation, though the defendant may have received rent from the under-tenants. And if an agreement purport, by the words attached to the signature of a particular person, to have been signed by that person on the behalf of another having an interest but not being a party, such person may be examined to prove that he signed in reality for a different person named as a party, and whose signature was not to the agreement, and that the statement of his having signed for the first-mentioned person was written by mistake.

Assumpsir by Thomas Rumball, the Elder, to recover damages for the non-performance of an agreement, by which the plaintiff, and a person named Bellamy, agreed to grant the defendant a lease for ninety-nine years, of certain premises, on which the defendant agreed, previously, to lay out the sum of 600l., and afterwards, to put the premises in complete repair. There were special counts on the agreement, a count for use and occupation, and the common money counts.

The agreement purported to be made between the plaintiff and a person named Bellamy of the one part, and the defendant of the other part. It appeared from the signatures to have been executed by a person named Thuaites for Bellamy, by Thomas Rumball, the Younger, for his sister, (who, it appeared afterwards, had an annuity secured on the premises,) and by the defendant for himself. There did not appear to be any signature of the elder

Rumball, the plaintiff, but the younger Rumball, who was called as a witness, stated that he signed it for his father. The special counts stated the agreement to be between the elder Rumball and the defendant.

Vaughan, Serjt., for a nonsuit.—Here is a direct variance between the declaration and the evidence. It was in consequence of the consideration passing from Rumball the Elder, that the defendant executed, and this Thomas Rumball has never signed it. There must be some reciprocity. What means have we of compelling Thomas Rumball the Elder to execute a lease? This is not the case of a deed poll, but an agreement, purporting to be between the parties. It appears from the instrument *itself that the plaintiff did not execute, and the evidence of the instrument cannot be contradicted by

parol testimony.

Pell, Serjt., contra.—The first question is, Who are the parties? They are Rumball and Bellamy on the one side, and Wright on the other. Rumball is one of the granting parties. It is not necessary that he should execute the agreement. Suppose that Wright only had put his name, yet Rumball, the party having the interest, might bring his action on that agreement. Though Rumball did not sign it, yet if he and the defendant acted under that agreement, the defendant might claim the lease of him. With respect to the objection, that the signature to the agreement declares Rumball the Younger to have executed it for his sister, that declaration is altogether nugatory, for she is not made a party to it. It is said that this cannot be controverted by parol testimony. But the testimony is not offered as a contradiction. If there is any mistake or error it may be shown. The parol testimony is only used for explanation.

BEST, C. J. On the last ground I shall receive the evidence. I am clearly of opinion that it is necessary to show that the elder Rumball executed the agreement, and I have doubts whether this has not been done.

had signed for herself I would not have received parol testimony.

Evidence was afterwards given, to show that Rumball the Elder had acted under the agreement.—The plaintiff also claimed rent for the use and occupation, and proved that the defendant had received rent from the under tenants of the premises. In the course of the case, it was proved that the defendant had laid out the 6001. required, and that the plaintiff had tendered a lease, which, because Miss Rumball was not made a party, the defendant's attorney *advised him not to accept; and it appeared, from an abstract sent to the defendant's attorney, that Miss Rumball had an annuity secured on the premises.

Vaughan, Serjt., contended, that the plaintiff, under the circumstances, was not entitled to rent from the defendant; and cited the cases of Kirtland v.

Poimsett, 2 Taunt. 145,† and Hegan v. Johnson, 2 Taunt. 148.‡

Pell, Serjt., stated, that the doctrine of Kirtland v. Pounsett was controverted in a case mentioned in a note to the case of Hearn and Another v. Tomlin, Peake's N. P. C. 254 n.§

† The case of Kirtland v. Pounsett decides, that if a purchaser, having paid the whole of the purchase-money, take possession of premises under a contract for a sale, which, or account of a defect in the vendor's title, fails to be completed, the vendor cannot afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation.

t In Hegan v. Johnson, it was held, that if, under an agreement for a lease at a certain rent, the tenant is let into possession before a lease is executed, the lessor cannot, during the first year, distrain for rent; for there is no demise express or implied. If a lease had been tendered to the occupier, and he had refused to execute it, he might have been

turned out of possession without any notice to quit.

§ The case referred to is that of Hell v. Vengken, Exchequer, Mich. 59 Geo. 3, in which the Court declared their opinion to be, that the vendor might, in cases where the contract went off without fault on his part, and the occupation had been beneficial to the vendee, recover a compensation for such occupation.

BEST, C. J. This is a question of law, and I think the action cannot be With respect to young Mr. Rumball, I think the agency is sufficiently established by the father's acting under the agreement. I am of opinion that the defendant is entitled to a verdict, for the plaintiff has not shown that he had authority to grant a lease; and if the objection had been made in time, ^{*592}] I should have *nonsuited the plaintiff. This is an action on an agreement, by which Rumball and Bellamy agree to grant a lease to Wright for ninety-nine years, and, as a consideration for it, Wright is to lay out 600l. previously, and afterwards to put the premises in complete repair. laid out the 6001, he has done the utmost that can be required of him under the circumstances. There is no part of the contract in which the defendant agrees to pay rent; but the substance of it is this: We, the granting parties, will grant you a lease, in which lease you shall covenant to pay rent; and they further say, that they have power to grant the lease. The defendant only says, I will take the lease. It does not appear that a lease with the proper parties was ever offered to him; for it appears by the abstract sent to the defendant's attorney, that Miss Rumball had an interest in the premises, and she is not a party to the agreement, and could not be compelled to join in the lease; nor does it appear that she was made a party to the lease in the draft that was sent, for no evidence has been given on that subject. I think, therefore, that the plaintiff is not entitled, either in law or justice, to recover, for, without the concurrence of Miss Rumball, he could not grant such a lease as any respectable attorney could approve on behalf of a client. The case in the Common Pleas, Kirtland v. Pounsett, 2 Taunt. 145, decided that a party let in as a purchaser was not liable for use and occupation: and this defendant is similar to a purchaser; he is not put in as a tenant, (and it is from the relation of landlord and tenant that the claim for use and occupation arises,) but he is put in to occupy till a lease shall be granted, and when the lease is granted, then he is liable to rent, but not before. The doctrine of the case in the Court of Exchequer is reconcilable with this; for there, it is laid down, that if a bargain goes off through the fault of the tenant, then a claim for rent *593] may be made. But in this case it is not the fault of *the defendant. If the plaintiff has no title, the defendant may be called upon to pay the rents which he has received from the occupiers to other persons; and in this case there is another person, that is, the annuitant, who can come on the property for the payment of the annuity. I am decidedly of opinion that the defendant is entitled to a verdict.

Verdict for the defendant.

Pell, Serjt., and Comyn, for the plaintiff.

Vaughan, Serjt., and E. Lawes, for the defendant.

[Attornies-Thomson, and West.]

WOODLEY et al. v. BROWN et al.

If A, sells corn to B., who buys on speculation, and the corn is landed at the warehouse of C., (the granary-keeper of B.,) who is told that he is to hold it on the account of A., A, has a sufficient property in it to enable him to maintain trover against C.

A return made by A. in such case, under the stat. 1 & 2 Geo. 4, c. 87, s. 12, of such corn as sold and delivered to B., is not conclusive evidence against A. of an absolute unconditional sale and delivery, so as to bar him of his right to recover it out of the hands of C.

TROVER for wheat. For the plaintiffs, it was proved that they were cornsactors, and were applied to by a person named *Loud* to sell him some wheat,

as he wanted to buy on speculation; that the plaintiffs agreed to sell, but said, that, as it was bought on speculation, it might as well remain under their care, and that they might as well have the commission on it as any one else. That Loud agreed to this; and that the plaintiffs, thereupon, called the defendants, and acquainted them with the bargain, and told them that they (the plaintiffs) were to land the wheat in their own names, and that they (the defendants) were not to know any one else in the transaction, but were to hold the wheat solely on their account. The delivery orders, three in number, *were put in and read. One of them contained the name of Loud, the other two the names of the defendants.

The clerk of the plaintiffs proved, that, at the time they were given to the defendants, all of them were made out in the name of Loud. He also proved that, about three weeks after, he met one of the defendants, and having heard of the failure of a Mr. Loud, who was engaged in the Sittingbourne Bank, asked him if it was the Mr. Loud who had bought the wheat of the plaintiff, and he replied that it was not, and added, but, suppose it were, what difference can it make to you? we landed the wheat in your names in our books, and we hold it for you, and shall not deliver it to any order but yours.

A person from the corn-meters' office also proved that he inquired of Mr. Young (another of the defendants) if he was the buyer of the corn, and that Young replied, No, it was Woodley's, and Woodley landed it. The witness charged the metage to the plaintiffs, and received it.

The defendants were the granary-keepers of Loud, and it did not appear that they had been employed by the plaintiffs before the transaction in question.

Wilde, Serjt., for the defendants. The question is, Whether the plaintiffs, who sold to Loud, procured the corn to be delivered to the defendants as the warehouse keepers of Loud, or of themselves! The delivery order is made out to Loud. Suppose Loud or his assignees had brought an action, would it have been any answer to talk of the understanding at the time of the bargain? The phrase "being under care" does not mean being in possession, but merely denotes a request that the plaintiffs might be employed on the re-sale. The conduct of Loud, therefore, does not prove that he assented to the wheat's being kept in the possession of the plaintiffs. The practice spoken to by the plaintiff's clerk is not the general practice of the corn market, but merely of the plaintiff's house, and that only sometimes. The effect of this is-A party says, I will not trust you with the corn, but I *will give you the order to go and take it, and trust to your honor. What was to prevent Loud from taking it when he pleased? The statute 1 & 2 Geo. 4. c. 87, s. 12, requires every corn-factor to make a weekly return of corn sold and delivered, and the plaintiffs, under this act, made a return of the corn in question, as corn sold and delivered to Loud.† This is not an action on a special *undertaking to hold for the plaintiffs, but it is founded on property. How is

[†] The statute 1 & 2 Geo. 4, c. 87, which was an act for regulating the importation and exportation of corn, enacts, s. 11, "That every corn factor carrying on his trade or busi-

exportation of corn, enacts, s. 11, "That every corn factor carrying on his trade or business in the city of London, or in the suburbs thereof, shall, within one month after this act shall have been in force, make a declaration in the form following: that is to say, "I, A. B., do hereby declare, that the returns of the quantities and prices of British corn, which henceforward shall be by or for me sold and delivered, shall, to the best of my knowledge and belief, contain the whole quantity, and no more, of the corn bona fide sold and delivered by or for me within the period to which they shall refer, with the prices of such corn and the names of the buyers respectively, and of the persons for whom such corn shall have been sold by me respectively, and to the best of my judgment conformable to the directions of an act passed in the second year of the reign of King George the Fourth, initialled (here set forth the title of this act.')

"Which declaration shall be in writing, and shall be subscribed with the hand of such

[&]quot;Which declaration shall be in writing, and shall be subscribed with the hand of such corn-factor, and shall be, by him or his agent, forthwith delivered to the Lord Mayor of the city of London for the time being, who is hereby required to grant a certificate thereof. to be registered by the inspector of corn returns; and in case any person shall carry on the trade or business of a corn-factor, without making the said declaration, agreeably to the directions of this act, every such person shall forfeit and pay the sum of fifty pounds."

the property made out? The plaintiffs were never in possession of the wheat at all. The goods, while in the ship, are still as much in the possession of the owner as if they were in his own warehouse. There is only an order to sell, by which the factor acquires no property. Therefore, there is no converson of the wheat of the plaintiffs.

BEST, C. J. If the evidence for the plaintiffs is true, there was a delivery to them, for the defendants were their agents. If I deliver goods to a carrier, the carrier's possession is my possession, and if I demand them, and he refuses to deliver them. I may be in the carrier to the carrie

to deliver them I may bring trover.

Wilde, Serjt. There can be no conversion if the goods were in the plaintiffs' own possession.

BEST, C. J. If I deliver to a man, I have a right of possession, and right

of possession is all that is required in trover.

Wilde, Serjt., then went to the credit of the plaintiffs' witnesses, and called Loud, who contradicted the proof as to the arrangement that the defendants were to hold the corn for the plaintiffs, and stated, that all that was agreed on was, that the plaintiffs should have the re-sale. He also called the Inspector of Corn Returns, who produced a return made by the plaintiffs under the statute 1 & 2 Geo. 4, c. 87, in which return the corn in question was mentioned as having been sold and delivered to Loud, within the week commencing the 9th, and ending the 14th of August.

Vaughan, Serjt., in reply. There is no dispute that Loud was the buyer; but the question is, whether the corn was not to remain for a stipulated time in the possession of the plaintiffs, and whether the defendants did not, after the sale, acknowledge it to be the plaintiffs' property? There is no contradiction to this latter part. It is not necessary here to discuss the general principles of law, for this case depends upon a particular agreement. The circumstance of the alteration of the name in two of the delivery-orders, not being explained, raises a suspicion of unfairness in the transaction on the part of the defendants. If a man takes wheat and holds it as mine, and becomes as it were my servant, against him the property is complete, and he cannot turn round and contest my right to have it back again.

The credit of the witnesses is material here. No man canlook at this case, as a moralist, and not say at once who is entitled to the verdict; for the defendants have paid nothing for the wheat, and yet they wish to set it off against a debt due to them from Loud. But, notwithstanding this moral title on the part of the plaintiffs, if there be any rule of law against their claim, of course that rule must prevail. It has been insisted on, that the plaintiffs have not a sufficient property to enable them to maintain this action; I am of opinion that they have a special property, which is quite sufficient, and therefore the question for consideration is, whether, before the delivery-notes, which are the symbols of possession, were parted with, an arrangement was made that the defendants should hold the corn on the behalf of the plaintiffs. If there was such an arrangement, the plaintiffs are entitled to recover. If a third person had obtained possession of the corn, the plaintiffs could not set up this arrangement against him, because he would properly say, you have parted with the delivery-notes and thereby encouraged me to purchase, and I have become a purchaser in consequence. But, if the plaintiffs' case is true, the defendants cannot make use of this kind of defence. The delivery to Loud was a condi-

s. 12. "And be it further enacted, that every such corn-factor shall, and he is hereby required to return or cause to be returned on the Wednesday in each and every week, to the said inspector of corn returns, an account in writing, signed with his own name or the name of his known agent, of the quantities of each respective sort of British corn so by him sold and delivered during the week, with the prices thereof, the amount of every parcel, with the total quantity and value of each sort of corn, and by what measure or weight the same was sold, with the names of the buyers thereof, and of the persons for whom such corn shall have been sold by him respectively, in default whereof every such semi-factor shall for every such neglect forfeit and pay the sum of ten pounds."

tional delivery. The *return made under the statute referred to has nothing to do with such a case as this. It goes to prove the delivery, and there is no doubt of the delivery. This brings it back to the real question, which is, was the corn delivered so that *Loud* had the entire control over it, or was there, before the delivery of the symbols of possession, a delivery of the corn to the defendants to hold on behalf of the plaintiffs? Unless the plaintiffs witnesses are perjured, the plaintiffs are entitled to a verdict.—His Lordship then left it to the jury to say, whether, on the evidence, they believed that there was a delivery to the defendants to hold for the plaintiffs, for that, if there was such a delivery, the plaintiffs were entitled to a verdict.

Verdict for the plaintiffs.

Vaughan, and Pell, Serjts., and Ryland, for the plaintiffs. Wilde, Serjt., and Selwyn, for the defendants.

[Attornice-B. Lewis, and Stevens & Co.]

In the ensuing *Hilary* term, *Wilde*. Serjt., moved for a rule *nisi*, for a new trial, on two grounds; 1st, that there was no property in the plaintiffs to support the action: but on this point the Court were unanimously against him. The 2d point was, that the return made under the statute of the 1st and 2d *Geo.* 4, c. 87, s. 12, of corn sold and delivered, was conclusive against the plaintiffs.

On this point the rule nisi was granted; and in the course of the same Term

it came on to be argued.

Vaughan, Serit., in showing cause, was stopped by the *Court, and Wilde, Serjt., called on to support his rule.—He contended, that as the return required is of corn sold and delivered, and not of corn sold only, the corn-factor's undertaking is, that he will make a return of corn bona fide sold and delivered. The object of the act was to ascertain the sales, but the deliveries were also necessary to show the correctness. The facts must be returned truly, at the peril of binding the interests of the party making such return. This act should be construed in the same way as the ship registry acts; and in Mestaer v. Gillespie, 11 Ves. Jun. 643, which was a case on the construction of those statutes, Sir William Grant says, their provisions compel parties to observe regulations not in any degree requisite for their own private interests, in order to accomplish the ends of the act. This return being required by an act of Parliament, the party cannot say—I kept the corn in my own He has no right to speculate on the intention of the Legislature. He is to make a true and bona fide return of corn sold and delivered: this means to cut down all constructive deliveries, and it is to be considered a delivery under the act for every conceivable purpose. The object is, that the corn shall so pass from one hand to another, as that the price may indicate a fair transaction. If a man may deliver corn to a person to hold for him, and then get it back, there may be twenty sales with constructive deliveries to swell the returns. The object of the statute undoubtedly is, to ascertain the sales and price; but the mode, the test, the security, is, that the corn shall have been delivered. If the words true and bona fide do not apply to the delivery, why do they apply to the price?

BEST, C. J. I do not mean to decide whether this return will exempt the party from penalties. The jury properly found that there was a delivery to the defendants to hold for the plaintiffs, though there was a sale to Loud. The object of the Legislature, by the act *of 1 & 2 Geo. 4, was to prevent the importation of corn till it had arrived at a certain price; and for

this purpose, they only wanted to know the price at which it was sold: to whom delivered is a matter quite beside the policy of the act. There is nothing in the act which requires that the return shall express the name of the party to whom the corn was delivered. The words are, "sold and delivered," that is, what bargains are made for the sale. There is an express direction that the name of the buyer shall be introduced, but not that of the party to whom the delivery was made; and here the well-known maxim applies, "Expressio unius est exclusio alterius." It is said, that fictitious bargains may be made, and an improper average formed in consequence. Such parties as do this may be indicted at common law for a conspiracy to defeat an act of Parliament, if there is no specific punishment in the act itself. I am of opinion that the verdict was properly found, and that the return had all the weight to which it was entitled.

The rest of the Judges agreed.

Rule discharged.

WOODROFFE v. HAYNE.

If A. give an accommodation acceptance to B., which B. gives to C., as a security for some acceptances of his, and these acceptances, when they become due, are paid by B. out of the produce of other acceptances given by C., but A.'s acceptance is not given up, though C. is desired not to present it, and A. informed that it will not be presented:—Held, that the original transaction is continued; and A., not calling for the delivery of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given.

This was an action on a bill of exchange, dated the 28th of October, 1823, for 3001., at three months, drawn by one Symons on, and accepted by, the defendant, and endorsed by Symons to the plaintiff.

The usual formal proof having been given on the part of the plaintiff, evidence was adduced on the part of the *defendant, from which it appeared that the bill in question was an accommodation-acceptance, which Symons' obtained from the defendant on the 28th October, 1823. It was sent to the plaintiff on the 29th, inclosed in a letter, which also contained two other bills for acceptance by the plaintiff, for the payment of which the bill on the defendant was to stand as a security. The plaintiff accepted these bills, and when they became due, money was provided to meet them by Symons, but the defendant's acceptance was not given up. Symons, on the 20th January, 1824, received two other acceptances from the plaintiff; and before the 31st of that month, (when the bill on the defendant became due,) in a conversation with him, told him that he need not present the defendant's bill, and that he would get him another of the same description, which, however, he failed to do. In the month of April, 1824, two further acceptances (making a third set) were received by Symons from the plaintiff, which became due on the 15th June. At the time when these were given, nothing was said about the 300l. bill on the defendant. On the 12th June, Symons became a bankrupt. appeared, in answer to a question from the Chief Justice, that the old bills were paid off by money raised upon the new ones, and that the defendant was aware of this, and also knew, in the month of March, 1824, that his acceptance was outstanding, but had been informed by Symons that it would not be presented.

Pell, Serjt., on these facts, contended that the plaintiff was not entitled to

Brev, C. J. I am of opinion that the plaintiff is entitled to recover. The

bill was, undoubtedly, originally given for the accommodation of Symons, with respect to the two first acceptances of the plaintiff. It is said that the defendant is discharged by the fact of those two acceptances having been paid. There would be something *in that argument if the transaction had been then put an end to. But it was not: there was a continuance of the same debt. The defendant did not call for the bill, and it is to be presumed that he allowed it to remain as a security for the subsequent acceptances.

Verdict for the plaintiff.

Wilde, Serjt., and —, for the plaintiff. Pell, Serjt., for the defendant.

[Attornies-Wilde & Co., and Leigh.]

COX et al. v. REID et al.

The registered owner of a ship is, prima facis, liable for goods furnished for the use of that ship; but such liability may be rebutted by evidence of the credit having been given to others.

given to others.

If there be a bill of sale of a ship, not containing any qualification, and such unqualified bill of sale be entered properly on the register, and there be also a deed of defearance, making void such bill of sale on the payment of a sum of money, the deed of defearance may be given in evidence on the part of the defendant, charged, in an action for goods, as the registered owner, in order to show the qualified nature of such defendant's ownership.

Assumest for goods sold.

The demand was for copper furnished in the month of September, 1818, for the sheathing of a vessel called the Asia. That vessel, on the 7th of October, 1817, became the property of certain persons of the name of Bulmer, who, (as appeared from indorsements on the certificate of registry and a bill of sale,) on the 20th of November in the same year, transferred their right to the defendants, who were bankers at Newcastle. The defendants retained their interest till the 7th of October, 1818, when they transferred it again to the parties from whom they had obtained it.

Vaughan, Serjt., for the plaintiffs, contented himself with proving these facts, and the delivery of the copper *during the time that the defendants appeared by the register to be the owners, resting his case on that liability, to which, he argued, in presumption of law, every registered owner is subject.

Pell, Serjt., for the defendants, put in, first, a paper, which had been proved (on the cross-examination of one of the plaintiffs' witnesses) to be in the handwriting of a clerk of the plaintiffs. It was to this effect—

Limehouse, 1818.

Messrs. Richard and Joseph Bulmer, Drs.

To Cox, Kelly, & Young.

September 21st.—To amount of copper account for supplies to the ship Asia, as per bill . . . £635 15 1

November 14th.—Cr. By amount of account for copper received per brig Claremont, as per bill . . . 247 9 0

Balance in favor of Cox & Co. £388 6 1

Pell, Serjt., then proved that Joseph Bulmer gave the order for the copper in question. He also called a ship-broker, who stated that he was employed

from December, 1817, to October, 1818, to sell the Asia, which was then lying in the City Canal; that Joseph Bulmer was the person who employed, and the employment was only on the subject of the sale, and that, as far as he knew, Joseph Bulmer had the sole control of the vessel.

On his cross-examination, it appeared that Joseph Bulmer was dead; that he had been owner of many ships, and became a bankrupt; and that he acted after his bankruptcy as ship's husband to some of the vessels which had pre-

viously belonged to his estate.

*Pell, Serjt., then offered in evidence a deed of defeazance, of the same date with the bill of sale from the Bulmers to the defendants, viz. the 20th of November, 1817, and between the same parties, making void the bill of sale, on payment, by the Bulmers, of a certain sum to the defendants.

The bill of sale was unqualified, and contained no allusion to the deed of

defeazance.

Vaughan, Serjt., objected to the reading of the deed. It is a distinct instrument; the plaintiffs are not parties to it. Lord Gifford, on the trial of a former action, brought against the defendants by other parties, for goods furnished at the contract of the contract o

nished to the same ship, refused to receive it in evidence.

BEST, C. J. With the greatest deference to my Lord Gifford, I think I ought to receive it. An endeavor is made to charge the defendants, not on account of their possession, but as they appear on the register to be owners, and surely they may be allowed to show in what way, and subject to what qualification, that ownership exists.

Vaughan, Serjt. It is contrary to the Register Acts, and therefore cannot be received; it is to control the operation, and do away with the effect of the

bill of sale.

BEST, C. J. If it is not registered, and does not contain the original certificate, it is void. No instrument, not properly registered, can confer either a legal or equitable interest; but it may be received as a declaration of the party at the time, that although he was made owner, yet he was only made so for a particular purpose.

The facts were eventually left to the jury, for them to say to whom the credit had been given; Best, C. J., cobserving, that, although a man's being registered owner made him, prima facie, liable, yet if it appeared in the particular case that the credit had not been given to him, his liability

was done away with.

The jury found for the defendants. Vaughan, and Bosanquet, Serjts., and D. F. Jones, for the plaintiffs.

Pell, Serit., Tindal, and Holt, for the defendants.

[Attornies-Swaine & Co., and Bell & Brodrick.]

CASES

AT

NISI PRIUS.

AT THE

SITTINGS IN HILARY TERM.

COURT OF KING'S BENCH.

SITTINGS IN LONDON IN HILARY TERM, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

M'INTYRE v. LAYARD, Esq.

A plaintiff may use as his evidence, answers given to interrogatories exhibited by the defendant in the cause; but if he does so, cannot object that some of them are not evidence, on account of their appearing to state the contents of written papers.

FALSE imprisonment.

Brougham, for the plaintiff, wished to read certain answers to interrogatories sent out by the defendant, under two rules of Court, for the examination of witnesses at Malta.

The Attorney General objected. These depositions are taken by us, and, under the terms of the rule, it is not competent to them to read them as their

evidence. We may use them or not as we please.

The rules were then referred to. One was for the examination, by the defendant, of certain witnesses at *Malta*, to be cross-examined by the plaintiff; and another for the *examination of witnesses by both parties. There was a provision that the depositions should all be transmitted to the Clerk of the Rules, and be "admitted to be read and given in evidence at the trial of the cause, saving all just exceptions.

The Attorney General. If the plaintiff is allowed to do what he seeks to do, it will place us in a different situation to that we should have been in if the witnesses had been in Court; for, under the rule, we examine in chief and they cross examine. If the witnesses had been here, and called by them, we should

(344,

have cross-examined; and the terms of the rule do not say the depositions shall be read by each. I never knew of any instance of the kind, and on principle

it is not good.

Brougham. Both parties may read indiscriminately; they may use the depositions as a common fund, and the reason is this, the plaintiff would have examined these witnesses if the defendant had not done it for him. Crossinterrogatories are in the nature of an examination in chief.

ABBOTT, C. J. The distinction is, that on cross-interrogatories you may put

leading questions.

After some further conversation, the answers were allowed to be read, sub-

ject to Mr. Attorney General's objection.

In the course of their being read, Brougham made an objection to some of them, giving as his reason, that they were not receivable, inasmuch as they appeared to state the contents of written documents.

ABBOTT, C. J. Are they not to be considered as your evidence?

*6081

*Brougham. I abstain from putting the question.

ABBOTT, C. J. Can you do that now? There is the difficulty. I think if you use the examinations, you must be considered as putting the questions, always saving, that no leading question can be put by you till crossexamination.

It turned out that much of what Brougham had objected to was afterwards elicited, in effect, in answer to questions put on behalf of the plaintiff on the cross-interrogatories, the same question being put on them as was put on the interrogatories in chief, and a reference being made to the answer which had been previously given.

Verdict for the plaintiff.

Brougham, and Chitty, for the plaintiff. The Attorney General, for the defendant.

[Attornies—Pritchard, and Derby.]

SITTINGS AFTER HILARY TERM, AT WESTMINSTER.

BEFORE LORD CHIEF JUSTICE ABBOTT.

REX v. HEPPER.

If an insolvent debtor has sworn that his schedule contains a full, true, and perfect account of all debts owing to him at the time of his petitioning for his discharge, an assignment of perjury on that oath, stating, that "whereas in truth and in fact the said schedule did not contain a full, true, and perfect account," &c. (in the words of the oath,) is too general; it ought to state what debt he is charged with omitting.

PERJURY.

The indictment stated, that the defendant had petitioned *for his discharge under the Insolvent Debtors' Act, and falsely swore that his schedule (meaning the schedule, &c.) contained a full, true, and perfect account of all debts, at the time of presenting his said petition, owing to him, or for his Vol. XII.-44

benefit or advantage, either solely or jointly with any person or persons. The assignment of perjury was in these words-" whereas, in truth and in fact, the said schedule did not contain a full, true, and perfect account of all debts owing to the said John Hepper at the time of presenting his said petition, which he, the said defendant, then and there well knew;" and that the said defendant, on the day and year aforesaid, at the parish and county aforesaid, before the said Court, &c., having such competent authority, &c., falsely, maliciously, and wickedly, &c.

As soon as the case was called on, Abbott, C. J., said, The assignment of perjury in this indictment is too general. The indictment imputes to the defendant that he had omitted to put in his schedule some debt that was due to him, he having sworn that he had inserted in it all debts due to him; and as the assignment of perjury does not at all state what debt the defendant is charged with omitting, how can he possibly be prepared to make a defence? It falls within the principles laid down in the case of J. Anson v. Stuart, 1 T. R. 748. However, as my Brother Judges are sitting in an adjacent room, I will consult with them.

His Lordship, having conferred with the other Judges, said, My learned Brothers agree in opinion with me, that this assignment of perjury is too general, and cannot be supported, and that if a conviction took place, the judgment must be arrested. Either party may move the Court to quash the indictment, but I shall strike it out of the paper.

*His Lordship directed the case to be struck out of the paper, which

was done, and no jury was sworn on it.

Brodrick, and Prendergast, for the prosecution.

Andrews, for the defendant.

[Attornies—Pickering, and Constable.]

The case of J'Anson v. Stuart, 1 T. R. 748, was an action for a libel, which stated that the plaintiff was a swindler. The defendant pleaded in justification that the plaintiff was a swindler, and had been guilty of defrauding divers persons; but this plea was held to be bad, on the ground that it was too general, and that the defendant ought to have stated the instances of fraud by which he meant to support the charges imputed by the libel.

LONG v. HORNE.

If the declaration state, that the defendant, being owner of a stage-coach, undertook to carry "the plaintiff, her children, and servants, together, in and by a certain stage-coach," evidence that the whole inside of the coach was taken for the plaintiff and her three daughters, and two outside places for her servants, will support the declaration: and the defendant having sent a double-bodied coach, and refusing to take them, unless one of them would travel in one body and the other in the other body, is a breach of this agreement. The statute 50 Geo. 3, c. 48, enacting that double-bodied coaches shall only carry eight outside passengers, it is also a breach of the agreement that there were eight other outside passengers permitted to go by the coach, if the plaintiff's servants refused to go by it on that account.

ASSUMPRIT.

The declaration stated, that the defendant, being owner of a certain stagecoach, &c., in consideration that the plaintiff would engage six places or seats in and upon the said coach, for herself and three children and two servants, at and from the Golden Cross to Dover, together with their luggage, for reasonable hire, &c., the defendant undertook, &c., "to carry and convey the said

plaintiff, her said children, and servants, and their luggage together, in and by the said coach." It then proceeded to aver, that the plaintiff took the places, and was ready with her children and servants to be carried, and requested the defendant to carry, &c., "in manner aforesaid;" yet the defendant, not regarding, &c., did not, nor would, when so requested as aforesaid, or at any other time, carry or convey the plaintiff and her said children, &c., in and by the said coach, or otherwise, or any or either of them, but wholly refused, &c., whereby the plaintiff was forced to hire another conveyance, &c. Plea—General issue.

It appeared that, on the 11th August, 1824, a person, who was a witness for the plaintiff, called at the defendant's coach-office, at the Golden Cross, Charing-cross, to take "the whole inside of the Dover coach," for four ladies, and two outside places for their servants. The defendant's book-keeper said that they could not have those places, as one inside place was booked, but that three of the ladies might have inside places, and the fourth an outside place, or go by another coach. To this the witness replied, "That will not do, as all the ladies wish to travel together," and left the office, when he was followed by the book-keeper, who said that they would take the offer, and the four inside and two outside places were booked, and four pounds paid for them. And it further appeared, that on the day for which the places were taken, the plaintiff, a widow lady, her daughters, and two servants, went to the Golden Cross, and there found what is called a double-bodied coach, which is a coach having a coach-body to contain four persons, and an additional body, like that of a chariot, in front of it, to contain two more; but the servants of the defendant refused to permit the plaintiff and her three daughters to travel together in the coach-body, but insisted on three of them travelling in that, and one of them in the chariot-body, because a passenger, previously booked, had secured a place in the former; however, this the plaintiff refused.

Scarlett, for the defendant, objected, that, on this evidence, the defendant appeared to have fulfilled his "contract, as he gave the plaintiff four [*612

inside places, though in different parts of the carriage.

ABBOTT, C. J. If a family of four ladies take inside places in a coach, saying they wish to travel together, I am clearly of opinion that you have no right to separate them.

Scarlett then objected, that it was not so laid in the declaration.

ABBOTT, C. J. I think, as at present advised, that the declaration is sup-

ported by the evidence.

Evidence was then adduced, to show that there were eight outside passengers on the coach, previous to the arrival of the plaintiff's servants, who, by the direction of the plaintiff, refused to go with that number; and that the plaintiff and her family and servants went by post-chaises, at an additional expense of 91.

For the defendant, the license from the stamp-office was put in, authorising ten outside passengers, and witnesses were called to prove that there was ample

room for ten.

Gurney, and Chitty, contra, relied on the statute 50 Geo. 3, c. 48, s. 2, which enacts, "that all stage-coaches, called long coaches, or double-bodied coaches, shall be permitted to carry eight outside passengers, and no more, exclusive of the coachman, but including the guard, where there is a guard, under such fine or penalties" as are imposed by that act.

ABBOTT, C. J. That puts an end to the case, and the plaintiff is entitled to

recover the difference of the expense incurred.

Verdict for the plaintiff—Damages, 91.

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*Gurney, and Burton, for the plaintiff.

Scarlett, and Chitty, for the defendant.

EAGERTON, Esq. v. FURZEMAN.

If an action, for money had and received, is brought against the stake-holder on a dogfight, to recover the stakes, on the ground that the plaintiff's dog won; the Judge will order it to be struck out of the cause paper, as he will not try which dog won the battle

Assumers to recover the sum of one hundred pounds which had been deposited in the hands of the defendants, as the stake upon a dog-fight.

It was opened that the plaintiff was entitled to the stake because his dog had

won the battle.

ABBOTT, C. J. I certainly shall not try the case: I am of opinion that the time of the Court is not to be wasted in trying which dog or which man won a battle, as the whole of these wagers are illegal.

The case was ordered to be struck out of the paper.

Brougham, and Holt, for the plaintiff.

Chitty, for the defendant.

Brougham intimated his intention of submitting a motion to the Court in this case, by putting down the name of it in the list of new trials to be moved; but when called on by the Lord Chief Justice, he declined making any motion.

*In the case of Henkin v. Guerss, 2 Camp. 408, Lord Ellenborough refused to try an action for a wager, whether a person could be held to bail on a special original for a debt under 40L, and the Court of King's Bench approved of what he had done. S. C. 12 East, 247. And in the case of Brown v. Lesson, 2 H. B. 43, Lord Loughbrough also refused to try an action for a wager respecting the number of chances in throwing seven and eleven on two dice.

ADJOURNED SITTINGS AFTER HILARY TERM, IN LONDON.

BEFORE LORD CHIEF JUSTICE ABBOTT.

STABLES v. ELEY.

In an action on the case, for the negligent driving of the defendant's servant, if it appear that the defendant holds himself out to the world as the owner of the cart, by suffering his name to remain painted on it, and over the door of the house of business to which it belonged, the action is maintainable against him, although it is proved that he had for some days ceased to be owner of the cart and concerned in the business, having resigned both up to his former partner.

Case, for an injury done to the plaintiff's carriage by the negligent driving of the defendant's carter.

It appeared that on the 20th of July, 1824, the plaintiff's wife was driving a poney carriage, when the cart came against the carriage at a very rapid pace, and broke it.

The defence was, that the cart was not the property of the defendant, but belonged to a person named King, and that the carter was the servant of Mr. King, who had been in partnership with the defendant, but that that partner-

ship was dissolved on the 1st of July, 1824.

These facts were proved by Mr. King; but, on his cross-examination, he admitted, that, at the time of the accident, the defendant's name was on the cart and over the door of their house of business in Thames-street, and that when the plaintiff's clerk applied at that place for a compensation for the injury, he was not told of the dissolution of partnership.

ABBOTT, C. J., ruled, that as the defendant, by permitting his name to remain on the cart and over the door of the house of business, held himself out to the world as the owner of the cart and the master of the driver of it,

he was responsible for the negligence of such driver.

Verdict for the plaintiff—Damages 61. 10s.

Scarlett, and Comyn, for the plaintiff. Marryatt, and Gurney, for the defendant.

[Attornies—Grimaldi & S., and Noy.]

SMITH, Gent., one, &c., v. WATTLEWORTH.

An attorney's bill for business done in the Insolvent Debtors' Court, is a taxable bill; and to entitle him to recover its amount it must have been signed by him, and delivered a month before action brought, under the stat. 2 Geo. 2, c. 23.

Assumpsit for an attorney's bill for business done in the Insolvent Debtors' Court. The first count of the declaration stated, that the defendant was indebted to the plaintiff for work and labor, &c., done and performed by the plaintiff for the defendant, " as the attorney of the defendant, about the prosecating of insolvent business for the defendant, and for certain fees due, and of right payable, to the said plaintiff in that respect, and for drawing certain schedules," &c. To this were added the other common money counts.—The defendant was not sued by attachment of privilege, nor did the plaintiff declare as an attorney of the Court of King's Bench.

It appeared, that in May, 1822, the defendant being in execution, procured his discharge under the Insolvent Debtors' Act, the plaintiff being employed by him as his attorney for the purpose of obtaining such discharge. plaintiff's bill had been taxed by the proper officer of the Insolvent Court; but it was admitted that the bill delivered to the defendant was not signed by *616] the plaintiff, *who was, in fact, an attorney of the Court of King's Bench.

Denman, for the defendant, objected, that the plaintiff could not recover, because the bill delivered was not signed by him. He could only act in the Insolvent Debtors' Court as an attorney, because, if he was not an attorney, he could not by law practise there, as, by the Insolvent Debtors' Act, none but attornies of one of the superior Courts could transact business in that Court.

ABBOTT, C. J. Is there not some case where the bill was for business done at the Quarter Sessions? The plaintiff here sues for business done as an attorney, and I shall, therefore, nonsuit him, giving his Counsel liberty to move to enter a verdict for the plaintiff.

Nonsuit, with liberty to move to enter a verdict for the plaintiff for 10% 6s

F. Pollock, for the plaintiff. Denman, for the defendant.

[Attornies—J. & A. Smith, and Clark.]

In Easter Term, F. Pollock moved for leave to enter a verdict for the plaintiff in this case, and the Court granted a rule nisi.

BEFORE ABBOTT, C. J., BAYLFY, HOLROYD, AND LITTLEDALE, J&

In Banc.

Denman now showed cause. By the statute 2 Geo. 2, c. 23, s. 23, it is enacted, that no attorney or solicitor of seither of the superior Courts shall commence or maintain any action or suit, for the recovery of any fees, charges, or disbursements at Law or in Equity, until the expiration of one month after delivery of his bill, signed, &c. Now this act does not at all limit these provisions to bills for business done in the Court of which the party is an attorney; and it has been held that a bill for business done at the Quarter Sessions or at the Great Sessions of Wales, must be delivered a month under this statute; and there can be no reason why business done in the Insolvent Court is not equally business done at Law.

HOLROYD, J. The Insolvent Debtors' Act (1 Geo. 4, c. 119) makes that

Court a Court of Record for the purposes of that act.

Denman. Even the exception, that a bill for conveyancing is not taxable, seems hardly warranted by the words of the statute 2 Geo. 2, c. 23. The only section of the Insolvent Debtors' Act, 1 Geo. 4, c. 119, which appears to bear on this case in any way, is s. 31, which enacts that the Insolvent Debtors' Court is to admit any number of fit persons, in their discretion, to practise as

attornies or agents in that Court on behalf of prisoners in custody.

F. Pollock, in support of the rule, argued, that as the Insolvent Debtors' Court might appoint persons to act as agents who are not attornies, if this Court held that a bill must be delivered by an attorney for business done there, it would cause one rule to be followed by attornies and another by agents; and 2d, that this was not business in Law or Equity. The Insolvent Debtors' Act was only temporary, and the business was neither matter of Law nor Equity, and the Court itself was only a Court of Record for the purposes of that act, and the items were not such as the Master in this Court could form an accurate judgment on; and, further, that under s. 1 of the statute *1 Geo. 4, c. 119, an officer is appointed to tax bills in the Insolvent [*618]

BAYLEY, J. No such officer is mentioned in the first section of that act.

F. Pollock. No, my Lord; it allows the Insolvent Debtors' Court to appoint officers, and such a one has been appointed; and, by s. 48, that Court has a power, in certain cases, of awarding costs.

BAYLEY, J. But those appear to be costs between party and party.

LITTLEDALE, J. That court may have even a power to tax coets; but it is another question whether an attorney of this Court can recover in an action brought here, unless he conforms to the statute 2 Geo. 2.

F. Pollock. That will depend on whether it is business in Law or in Equity.

LITTLEDALE, J. Is not the obtaining a person's discharge from a writ of

execution business at law?

F. Pollock. This is, in reality, an excrescence on the law, like the business of bankruptcy.

ABBOTT, C. J. But it has been held, that a bill for obtaining a bankrupt's certificate is taxable, and the Lord Chancellor sitting in bankruptcy, that is

certainly not business in Equity.

F. Pollock. But the Insolvent Debtors' Court having an officer to tax costs

there, such a bill would hardly be taxable in this Court.

*ABBOTT, C. J. I think that the nonsuit in this case was right, and that a bill signed ought to have been delivered. The question is, whether this was business done at Law? Now, it being to discharge a person who was in custody under a writ of execution, it appears to me, therefore, to be business done at Law as much as business done at the Quarter Sessions. Mr. Pollock's argument is, that it would lay down two rules, one for those who practised in that Court and who were attornies, and another for those who were not. However, there are many things done at the Quarter Sessions which may be done by one not an attorney, such as serving notices, attending witnesses, and the like; and I think, this being business done at Law, and the plaintiff being an attorney, he cannot sue without having delivered his bill under the statute of Geo. 2. I do not think that that Court having an officer to tax bills is very material, because, however that may be convenient, it cannot do away the necessity of the bill being delivered.

BAYLEY, J. The Insolvent Debtors' Court is a Court of Record, and it has power to discharge persons from process, and the attornies practising in it have to deliver briefs to Counsel, to subposna witnesses, &c. It has been stated that there is an officer to tax bills, but the plaintiff being an attorney of this Court, it has a general superintending power. I think this business done at Law. 'The Insolvent Debtors' Court either has an officer to tax bills or it has not: if it has, as soon as the bill is delivered, you may have it taxed by that officer; but if it has not, it may be taxed by the Master on the civil side of this Court. The statute of George the Second was intended for the benefit

of the subject, and ought to receive a liberal construction.

HOLROYD, J. I agree with the rest of the Court in thinking, that, in this

case, a bill should have been delivered under the statute of Geo. 2.

*ELTTLEDALE, J. This business, though not done in what is ordinarily called a Court of Law, being for the discharge of a person from the process of this Court, is, in my judgment, business done at Law within the meaning of the act; and it is quite a different question whether the bill should be taxed in this Court or in the Insolvent Debtors' Court.

Rule discharged.

ADJOURNED SITTINGS AFTER HILARY TERM, AT WESTM.

BEFORE LORD CHIEF JUSTICE ABBOTT.

DOE, on the dem. of CRAWSHAW, v. SHEPHERD.

Practice.—If the Court has set aside the judgment against the casual ejector, on the present defendant undertaking to enter into the consent-rule, plead, and take short notice of trial for the adjourned Sittings. The adjournment day being Monday, April 11, and the defendant having pleaded on Saturday, the Lord Chief Justice, on application being made on the 11th, allowed the cause to be entered.

SCARLETT moved for leave to enter this case for trial.

In Hilary Term, the Court had set aside the judgment against the casual ejector, the defendant undertaking to enter into the consent-rule, plead, and take notice of the trial, for the adjournment-day. The defendant had pleaded on the 9th of April, (Saturday,) and therefore the terms imposed on him by the Court above would be of no advantage to the lessor of the plaintiff unless the cause was entered forthwith, this being the adjournment-day, and the cause could not now be entered without a special order from his Lordship.

ABBOTT, C. J. Take an order.

*WALTON v. GREEN.

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In assumpsit, for board and lodging supplied to the defendant's wife, if the defence is, the adultery of the wife, a statement made by her, confessing her adultery, which statement was made immediately previous to her husband turning her out of doors, is admissible in evidence on the part of the husband, and so are letters from different men, found by him at that time in her writing-desk.

Assumpsit, for board and lodging supplied to the wife of the defendant, he having turned her out of doors.

The defence was, that she had previously committed adultery.

The defendant's counsel wished to give in evidence a statement that the defendant's wife had made to one of her husband's clerks, confessing that she had had a criminal intercourse with a person whom she named. This couversation took place just before her husband turned her out of doors.

Scarlett objected, that what the defendant's wife said could not be evidence

in an action against her husband.

ABBOTT, C. J. I think it is evidence, because the question is, whether the defendant, her husband, was justified in turning her out of doors; and, therefore, what she says just previous to that time, as it formed part of the cause of her being so turned out, is in my opinion admissible.

The evidence was then received. Several letters from her to her husband were also put in and read; they were written a short time previous to the con-

versation with her husband's clerk.

A witness also proved that, about that time, the defendant broke open his

wife's writing-desk, and found a number of letters, which were put in. These letters were from two officers of the 85th regiment. They were about to be read, when the plaintiff's Counsel submitted to a

Nonsuit.

*Scarlett, and Comyn, for the plaintiff.
Brougham, and Tindal, for the defendant.

[Attornies—Harnet, and Blackstock & B.]

REEVE, who sues, &c., v. POOL.

The penalty of twenty pounds per chaldron for every chaldron of coals of one sort, sold as and for another sort, inflicted by the stat. 47 Geo. 3, Sess. 2, c. 68, is a penalty exceeding 20L, and therefore recoverable in the superior Courts, under s. 150 of that statute.

DEST, for penalties under the statute 47 Geo. 3, Sess. 2, c. 68, s. 33, for the regulation of the vending and delivery of coals within twenty-five miles of the

Royal Exchange.

The declaration stated, that, after the making of a certain act of Parliament, &c., and within three calendar months, &c., the defendant, on, &c., at, &c., being then and there a vendor of, and dealer in coals, did, within such part of the county of Middlesex as is situate within the distance of twenty-five miles from the Royal Exchange, in the city of London, knowingly and wilfully sell to one Thomas Burrows, Esq., one sort of coals as and for what they really were not, that is to say, fifteen chaldrons of a sort of coals called Wellington Main Coals, for and as a sort of coals called Russell's Walls-end Coals, the same coals, so sold as aforesaid, then and there being coals of a different sort from coals of the said sort called Russell's Walls-end Coals, contrary to the form of the statute, &c., whereby, &c., the defendant became liable to pay for his said offence the sum of 201. per chaldron for each and every of the said chaldrons of coals so sold by him, the said defendant, as aforesaid, then and there amounting to the sum of 300l., and thereby, &c. There were other counts similar to this, for other offences, on this section of the statute. Plea-Nil Debet.

The facts having been proved,—

Brougham, and Chitty, for the defendant, contended, *that this action was not maintainable, because, by the 146th section of the act, all penalties not exceeding twenty pounds were only recoverable before a magistrate, within one calendar month after the offence; and though, by the 150th section, penalties exceeding 201. are recoverable within three calendar months by action of debt, yet the forfeiture of 201. a chaldron imposed by the 33d section, on which this action is brought, is a twenty pound penalty, though, for a number of offences, it may amount to a larger sum; and if the penalties in this case were not recoverable before a magistrate, it would lead to this anomaly, that if a man sold one chaldron, the offence would be cognizable before a magistrate, but if he sold two, the remedy would be by action of debt.

ABBOTT, C. J. Might it not be intended by the Legislature that a magistrate should have power to decide where the matter in dispute did not exceed twenty pounds, but they did not choose to entrust cases of larger amount to his de-

cision ?

The Attorney-General, Denman, and Tindal, contra. The selling of seve-Vol. XII.—45 2 g 2 rel chaldrons at one time is only one offence, and only one penalty is incurred by that offence, which penalty is estimated by the number of chaldrons sold.

ABBOTT, C. J. (having consulted with the other Judges, who were sitting in pursuance of the King's warrant.) 'The case must proceed, and if the objection is a good one, it is on the record.

Verdict for the plaintiff.

The Attorney-General, Denman, and Tindal, for the plaintiff. Brougham, and Chitty, for the defendant.

[Attornies—W. L. Newman, and In person.]

*BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS. [*694

In Banc.

Chitty now moved in arrest of judgment on the points taken at the trial; and cited the case of Rex v. Rawlinson, (not reported,) which was an application to this Court for a mandamus, to be directed to a magistrate, commanding him to hear a complaint on the 117th section of this same act, for a penalty "not exceeding 40s. a sack," for deficiency of measure, the complaint being for sixteen sacks; and in that case the Court granted the mandamus, although the 40s. penalty on sixteen sacks was above 20l.

BAYLEY, J. The penalty in this case is so many times 20l. at all events, in the other it is not to exceed 40s. a sack; and I think the ground on which the Court went in the case of Rex v. Rawlinson was, that the magistrate could mitigate that penalty to a sum within his jurisdiction, and that though the offence, if visited by the heaviest penalty, would exceed the sum to which the Justice was limited, yet the informer, by going before a magistrate, must be

taken to go for no larger a sum than 201.

ABBOTT, C. J., having read the 33d section of the act, said,—'The penalty imposed by this section is one penalty, the amount of which is to be regulated by the number of chaldrons, and is very distinguishable from the case of *Rex v. Rawlinson*. It that case there was a power of mitigating the penalty; and it is considered by the Court, that where a penalty can be mitigated, it is meant to be recoverable before a Justice, as, on an action of debt in this Court, there can be no mitigation of the amount of the penalty.

BAYLEY, J. The cases are very distinguishable; and the present [8825]

penalty is clearly recoverable by action.

Holroyd and Littledale, Js., concurred.

Rule refused.

By the statute 47 Geo. 3, Sess. 2, c. 68, s. 33, it is enacted, "That if any vendor or vendors of, or dealer or dealers in, coals, shall knowingly sell one sert of coals for and as a sort that they really are not, within the said port of London, or within the respective cities of London or Westminster, or the respective liberties thereof, or within such part on parts of the respective counties of Middlesex, Surry, Kent, and Essex, as is or are situated within the distance of twenty-five miles from the Royal Exchange aforesaid, every such offence the sum of twenty pounds per chaldron for every chaldron so sold; and such vendor or vendors of, or dealer or dealers in, coals, shall not be subject or liable to any penalty imposed by the said recited act made in the 9th year of the reign of her Majesty Queen Anne, entitled, An act to dissolve the present and prevent the future combination of coal-owners, &c., or by the said recited act, made in the 3d year of the reign of his late Majesty King George the Second, entitled, 'An act for the better regulation of the coal trade,' on every person who shall knowingly sell one sort of coals for and as which they really are not: Provided always, that no vendor or vendors of, or dealer or dealers in, coals, shall be subject to such penalty for or in respect of any number of chaldrens exceeding twenty-five chaldrons, for the same offence."

GREENING v. WILKINSON.

In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion.

TROVER for East India Company's warrants for cotton.

Evidence was given that the cotton was worth sixpence per pound at the time of the refusal to deliver it up, but would now be worth tenpence-halfpenny.

*The Attorney General contended, on the authority of the case of Mercer v. Jones, 3 Camp. 477, that the damages should be the value at the time of the conversion.

Scarlet, contra, contended that it must be the price at the time of the verdict, in the same way as damages for the non-performance of an agreement to repurchase stock.

ABBOTT, C. J. I think that case is hardly law, and that the amount of damages is for the jury, who may give the value at the time of the conversion, or at any subsequent time, in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. I am therefore of opinion that the price of the article on the day of the conversion is by no means the criterion of the damages. It may be said, that if he had wanted cotton he might have immediately bought more, at that day's price, as soon as he found that this cotton was detained from him; but, then, to do that, he must have had the money, which he might not have ready on the very day of the detention, nor on any day after till the price had risen; and my opinion is, that the jury are not at all limited in giving their verdict by what was the price of the article on the day of the conversion.

Verdict for the plaintiff.

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Scarlett, and Comyn, for the plaintiff.
 The Attorney General, Gurney, and F. Pollock, for the defendant.

[Attornies-Mayhew, and Beddome & B.]

The case of Mercer v. Jenes, 3 Camp. 477, was an action of trover for a bill of exchange: the plaintiff's Counsel contended that the amount of the damages ought to be the *627] principal and interest *up to the final judgment. The defendant's Counsel contending that the verdict ought to be for the principal only; Lord Ellenborough said, "In trover the rule is, that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion;" and his Lordship directed a verdict for the amount of the bill and the interest up to the time of the conversion only.

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER, AFTER HILARY TERM.

BEFORE LORD CHIEF JUSTICE BEST.

HELLINGS v. GREGORY the Elder, and GREGORY the Younger.

In an action on an attorney's bill against two defendants, it is not sufficient to prove a

an action on an attorney's bill against two defendants, it is not sufficient to prove a joint employment, and a joint promise to pay, after the delivery of the bill, but it must be shown that the business was done for the joint benefit.

If A. and B., being arrested on a bill of exchange, of which one is drawer and the other acceptor, go to an attorney, and request him to defend them, and he does so on their joint application, there is sufficient consideration to support a joint promise to pay, and consequently to sustain a joint action by the attorney against them.

In an action on an attorney's bill, it is only necessary to give evidence of the retainer, and the delivery of the bill, the Prothonotary being the proper party to decide on the items of it.

Assumestr on an attorney's bill.

The bill contained three sets of charges: one was for a journey to Bridgesouter to inspect title-deeds, and was introduced in this form, "You having good reason to think yourself entitled," &c. Another set of charges was for business done in defending both the defendants in actions on a bill of exchange, of which one was the drawer and the other the acceptor: and the third set of charges was for business done on the elder defendant's taking the benefit of the Insolvent Debtors' Act.

The plaintiff's clerk proved, with respect to the first set, that both defendants came to the plaintiff, and requested him to undertake the journey to Bridgewater; but, on his cross-examination, he admitted that the plaintiff had refused to do it on account of the father, and only *consented to go on the son's saying he would pay him. The same witness proved, with respect to the second set of charges, that both defendants having been arrested at the suit of one Toggill, sent for the plaintiff, and came the next day to his office, and then the son paid the fees for two bail-bonds, and said he would pay the plaintiff whatever charges were incurred in the business for himself and With respect to the third set of charges, no separate evidence was given; but it appeared that a copy of the whole bill was delivered to each of the defendants, and that they afterwards called together at the plaintiff's office and acknowledged the receipt of the bill, and requested the plaintiff to give them time; the younger defendant saying, in the presence of his father, that it was impossible to pay it at once, but that, if the plaintiff would allow it, he and his father would pay it by instalments.

Wilde, Serjt., for the defendants, contended, that, upon this evidence, the plaintiff ought to be called. There is one charge, which it is quite clear cannot be against any but the elder defendant, viz. that which relates to his taking the benefit of the Insolvent Act; and this furnishes a key to the nature of the one which is made for the journey to Bridgewater. The charge is properly against the father, and the promise by the son is to pay his father's debt; and therefore the action cannot be maintained jointly, nor even against the son without an undertaking in writing. With respect to the defence of the actions on

the bill, the circumstances of the case show, that the two defendants were never jointly liable to the plaintiff. Suppose a man and his partner are separately sued for some demand, and both employ the same attorney, will that create a liability to sustain a joint action?

BEST, C. J. It has been decided, that where no credit is given to one, and another undertakes to pay, it is not within the statute of frauds; but this case differs even *from that, for it appears that the credit is given to both. I

do not think this case has occurred before.

Pell, Serjt., for the plaintiff. I contend, that the evidence shows that the journey to Bridgewater was undertaken for both defendants. I abandon that part which relates to the discharge of the father under the Insolvent Act.

Best, C. J. I will leave it to the jury to say, whether the journey to

Bridgewater was for the benefit of one or both.

Pell, Serjt. That is not necessary. If I and another go to a third person, and employ him, whether it is for the benefit of one or not makes no difference. If two go to a builder and desire him to build a house, though one only is benefited, yet both are liable. We have only to look if the request be joint. bill, in this case, was presented to both, and both come and promise to pay.

Wightman, on the same side. The actions on the bill, it is true, were separate actions; against one of the defendants, as drawer, and the other, as acceptor: and yet, there is sufficient evidence for the jury to say, that there was a joint employment. There are many cases in which the statute of frauds does not apply on account of the original employment.

Wilde, Serjt., in reply, read some items of the bill, which were certainly separate charges, which, he contended, evidenced a separate employment.

BEST, C. J. The words of the statute of frauds are, that no action shall be brought, to charge a defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement *630] debt, default, or miscarriage of anomal, policy, and the memorandum or note the policy of the charged therewith. thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. I know it has been determined that if A, undertakes to pay for B, and no credit at all was given to B., A. is liable without a written undertaking. But it has been held, in many cases, that if any credit be given to B., A.'s undertaking must be in writing. If the business was done on the credit of both, but for the benefit of one, I think the action cannot be maintained. I shall, therefore, leave it to the jury to say, whether any part of the business was done for the joint benefit, for as to such part the plaintiff is undoubtedly entitled to recover. An observation has been made, which I consider to have great weight. It is said these are actions brought on the same bill, and though they are separate actions, yet each party has an interest in defending each action; and if the jury are of opinion, that it was for the joint benefit of both that the actions on the bill were defended, then the present action may be maintained.

Wilde, Serjt., then went to the jury on the questions, whether there was a joint undertaking, and whether the business was done for the joint benefit.

His Lordship told the jury, that, in his opinion, in point of law, the actions on the bill of exchange were defended for the benefit of both, and left it to them to say, whether they were, in point of fact, so defended, and on the undertaking of both; observing, that, in such case, the defendants might make a joint promise, and would be liable in the action.

The jury stated, that they considered the whole of the work as done on the undertaking of one of the defendants alone, and therefore found for the

defendants.

*Pell, Serjt., and Wightman, for the plaintiff. Wilde, Serjt., for the defendants.

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Wilde, Serjt., then went to the jury on the questions, whether there was a joint undertaking, and whether the business was done for the joint benefit.

His Lordship told the jury, that, in his opinion, in point of law, the actions on the bill of exchange were defended for the benefit of both, and left it to them to say, whether they were, in point of fact, so defended, and on the undertaking of both; observing, that, in such case, the defendants might make a joint promise, and would be liable in the action.

The jury stated, that they considered the whole of the work as done on the undertaking of one of the defendants alone, and therefore found for the

defendants.

*Pell, Serjt., and Wightman, for the plaintiff.
Wilde, Serjt., for the defendants.

ADJOURNED SITTINGS AFTER HILARY TERM, AT WESTM. BEFORE LORD CHIEF JUSTICE BEST.

TRIGGS, Administratrix, v. NEWNHAM.

A bill accepted, psyable at the office of an attorney, is presented at a reasonable time, if presented at eight in the evening in the month of February.

If a party, when he is arrested, say, "I shall go to my attorney's and pay the debt and settle it," such statement is sufficient to take the case out of the statute of limitations.

Assumperr, on a bill of exchange, against the defendant as acceptor.

Pleas—The general issue and the statute of limitations.

The bill was made payable at the residence of a Mr. Cockerell, a selicitor The notary's clerk proved that he presented it about eight o'clock in the evening in the middle of the month of February.

Taddy, Serjt., for the defendant, contended that the presentment was not made at a reasonable time. He cited Darbyshire v. Parker, 6 East, 3.

BEST, C. J. Darbyshire v. Parker does not apply to such a case as this. This case is distinguishable from the case where you are to give notice to a drawer. This is the case of an acceptor, and all that is required is, application or presentment at the particular place; and a presentment made at an attorney's office at eight o'clock in the evening, is, I think, quite in reasonable time.

"The sheriff's officer proved, that, on his saying to the defendant that he must have a copy of the warrant, the defendant observed, that he did not want it, for he should go to his attorney's and pay the debt and settle it.

Taddy, Serjt. This is not sufficient to take the case out of the statute of timitations. It does not meet this issue. The plaintiff alleges a promise, and is to establish a contract by the defendant after he has been discharged from the demand by a very wholesome statute. This is no proof of a new promise or new contract, but a mere reference to a solicitor.

BEST, C. J. It is not necessary that there should be a new contract or a new promise, an acknowledgment is all that is required; for if a man acknowledges a debt to be still due, the law implies a promise.

Verdict for the plaintiff.

Wilde, Serjt., and Platt, for the plaintiff. I'addy, Serjt., for the defendant.

[Attornies-Henson & D., and Carter.]

BEST, Esq. v. OSBORN.

A horse was sold under a written warranty, contained in a receipt for the purchase-money, which was given to the buyer's servant. The son of the seller (who was proved to have been present when the bargain was made, and to have acted at other times in his father's bisiness, but never to have sold a horse by himself) got the receipt back from the servant by a fraudulent representation:—Held, in an action on the warranty against the father, that, under such circumstances, parol evidence of the contents could not be given, but that the son must be called as a witness.—The son being called, proved that he went for the receipt by desire of a person named Tawney, the owner of the horse, for whom his father sold on commission, and did not mention the subject to his father till he had obtained it; his father then had possession of the receipt for a very short time, after which it was sent to Tawney:—Held, that this fact did not vary the case, so as to let in the parol testimony.

Action on the warranty of a horse. The plaintiff's groom proved that he paid for the horse, *and took a receipt, and that the defendant's son (who was proved to have been present at the time the horse was sold) came to him afterwards, and said, that he had seen the plaintiff at Long's Hotel, and was authorized by him to require that the receipt should be returned, upon which he gave it up.

Notice to produce it had been given, and the answer of Vaughan, Serjt.,

was, that the defendant had it not, nor ever had it.

Wilde, Serit., was then proceeding to examine as to its contents-

Vaughan, Serjt., objected. They should call the son, to whom the paper was delivered.

Wilde, Serjt. The son is in the father's service, and was in his company when the horse was bought. It is the same as if the father himself had gone and demanded the paper. The presumption is fair and natural, that, this being the same business, the son went by the father's direction. It is, prima facie, evidence of authority.

Best, C. J. The fact of the son's being present at the bargain one day, does not make him the father's agent to go another day and require, by a fraudulent

representation, the delivery of the receipt.

Wilde, Serjt., then proved, in order to establish the agency of the son, that he had been seen acting in his father's business, showing horses, and writing in the counting-house, after he had got the receipt back.—But the witnesses who proved it, admitted that they never saw him sell a horse by himself, but only in his father's presence.

*BEST, C. J. This will not do.

*634] Wide, Serjt. I am not seeking to fix the defendant with any contract, but I am raising a fair presumption that, in this business, the son was acting as the father's agent. Supposing that there were no express directions to do the particular act, yet as it was done for the father's benefit, it will affect him. Besides, the subsequent service was an adoption of the act complained of.

BEST, C. J. I am clearly of opinion that this is not evidence of agency. The son can only affect his father by such acts as are expressly authorized, or as come within the scope of a general authority. It is not pretended that in this case there was any express authority. And with respect to the general authority, it is admitted that the highest way in which it can be put is, that the son was a general servant: and what a situation would a master be in, if the act of his servant was to be admitted to show that he himself was a party to a fraud.

Wilde, Serjt., then called the defendant's son; who stated that he went for the receipt by the desire of a Mr. Tawney, who was the owner of the horse, (Tawney, as it appeared, having stated, that the defendant, who sold for him

had warranted without his authority,) but did not tell his father before he went, nor till two or three days after he got it. When he told his father, his father only said, he wondered that Tawney had not got it before. The witness said he would not swear that he did not give the receipt into the hands of his father before he sent it to Tawney, but distinctly denied having received

any orders from his father on the subject.

Wilde, Serjt., then proposed to give parol evidence of the contents of the paper, contending that he had traced it to the control of the defendant. A defendant cannot *say, after he has had notice to produce a document, 1*635 I have delivered it to another person, for such conduct would prevent a plaintiff from giving parol evidence in such cases at all. Young Osborne's going was in the course of his employment, because if a man suffers his servant to go on the employment of another, apparently clothed in his authority, it must be so taken. The paper was sufficiently in the father's control; and his dispossessing himself of it, or his servant's doing so, will not prevent my notice operating.

BEST, C. J. Consistently with the rules of evidence, I cannot get the contents of this paper. If the father had it in his hands he could not keep it. The son was the agent of *Tawney* only. I quite agree with my Brother *Wilde*, that if the father had obtained the receipt, he could not prevent the operation of notice by handing it over to another. I would not suffer a man in possession of a paper to shuffle it out of his custody, for such conduct might

drive the other party to call a most unwilling witness.

Wilde, Serjt., then consented to be nonsuited; saying, he could not, consistently with his Lordship's ruling, proceed with the case.

Wilde, Serjt., and Dwarris, for the plaintiff. Voughan, Serjt., and Platt, for the defendant.

[Attornies—Beavan, and Taylor.]

*HARRIS v. COSTAR et al.

Г*636

If the declaration, in an action on the case against coach-proprietors, for an injury received by the overturning of a coach, state that it was their duty to carry the plaintiff safely, for a certain hire, it does not mean to carry safely at all events; but will be sufficiently supported by proof of the want of due care.

Case.

The declaration stated that the defendants were proprietors of a mail-coach, and that the plaintiff was received as a passenger, to be carried safely for a certain hire, and that, in consequence, it became the duty of the defendants to carry him safely, yet that they, not regarding their duty, did not take proper care, but suffered the coach to be so overloaded, and drawn by such vicious and unmanageable horses, that it was overturned, and the plaintiff thereby injured, &c.

The principal witness was the coachman, who stated, that the plaintiff was the only outside passenger, that the only luggage on the roof was two small cases belonging to a person inside, and that the accident occurred in consequence of one of the leaders being startled by the flapping of a cover of a wagon which was blown to and fro. The horse, he admitted, had been only

used as a wheeler till within four or five nights of the accident, but had no vice,

and was a very fit horse for a mail.

Vaughan, Serjt., upon this, submitted that the declaration was not proved. There is no evidence of any overloading or of using any vicious horses, to say nothing of the form of the contract, which is quite new, that a passenger is to be carried, like a bale of goods, safely at all events.

BEST, C. J. I shall not say that there is any such contract: but there is evidence to go to the jury to say, whether the injury resulted from some negli-

gence or impropriety on the part of the defendants or their agents.

Wilde, Serjt. Our objection is, that in all the counts such a contract is set

out as your Lordship says is not a proper one.

*BEST, C. J. Is not this declaration in the common form? I understand it to mean, not that the coach-proprietor will insure the limbs of

his passengers, but that he will take due care.

Wilde, Serjt. Here is a contract capable of proof, and therefore, after verdict, it will be presumed to have been proved. The form of the declaration is the same as it would be in the case of a lost parcel. The plaintiff ought to be nonsuited.

Taddy, Serjt. The declaration is taken from that in Brotherton v. Davis,

in the Exchequer.

BEST, C. J., assented, and repeated that he thought it was in the common form.

Wilde, Serjt. In the case of Brotherton v. Davis, the point of the contract not being proved, was not made. That was a case in error, and the point was

set at rest by the verdict.

BEST, C. J. The point did occur, and Chief Justice Dallas said, that the contract need not be proved at the trial. If it had been the first time that this form had been used, I should have said, that it did not mean that the coach-proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

Vaughan, Serjt., inquired if his Lordship would give them leave to move? BEST, C. J. If you had made me doubt I would have saved the point, but

I think it is too clear.

*638] *Vaughan, Serjt., then went to the jury, contending that the gist of the action was negligence, and that was negatived by the evidence.

BEST, C. J., then summed up, repeating his opinion upon the law, and leaving it to the jury to say, whether they thought the plaintiff's injury had been produced by the negligence of the defendants or their servants, and if they did, to find their verdict for him.

Verdict for the defendants.

Taddy, Serjt., and Wightman, for the plaintiff. Vaughan, and Wilde, Serjts., for the defendants.

[Attornies-Tyrrel & Sons, and Hinrich & S.]

ADJOURNED SITTINGS AFTER HILARY TERM, AT GUILDHALL.

BEFORE LORD CHIEF JUSTICE BEST.

LEIGH v. SMITH.

If goods be sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board it. Semble, that it is his duty, either by himself or his servants, to see the goods put on board, and then make an entry of the shipment.

This was an action by a soap-boiler at Liverpool, against a wharinger in London, to recover the value of a hogshead of tallow, sent to the defendant's wharf for the purpose of being conveyed to Liverpool by a ship called the Mars, and which the plaintiff had never received.

*A carman proved that he deposited the hogsheads, with the plaintiff's direction on them, at the wharf, three or four yards from the ves-

sel, and did not see either the captain or mate.

The mate of the *Mars* proved, that he received two hogsheads, directed to the plaintiff, and no more. He also said, "We take no charge of the goods till we actually take them on board."

The master of the vessel confirmed the mate's testimony as to the receipt of two hogsheads only; but added, that there were three entered in the wharfinger's book, and, in consequence, he looked about for the third, but was not

able to find it.

Vaughan, Serjt., for the defendant. I admit that, for the wharfage, the wharfager is bound to put the goods into the charge of the party belonging to the ship. He does not undertake to ship or forward. When he once calls the attention of the people of the ship to the goods, he has done his duty.

BEST, C. J. A wharfinger receives goods, and he is to keep them till they are shipped; and, further, he is to see that the persons belonging to the ship do

in fact ship them.

Vaughan, Serjt., then cited the case of Cobban v. Doton, 5 Esp. N. P. C. 41, and contended, that it was enough for the wharfinger to make an entry in his book of the goods, as he had done in this case, such entry being notice to the captain, and throwing upon him the duty of searching for them and patting them on board.

BEST, C. J. If the entry were to be considered enough, what a situation would persons be in if the goods were to be lost, the day after they were sent,

through the negligence of the wharfinger.

*Vaughan, Serjt. The officer of the ship may load at his own convenience, but his responsibility commences with the notice. If the goods are stolen in the intermediate time between the notice and the loading, the ship officer is liable.

BEST, C. J. The ship-officer is not liable till he gets the custody of the

goods.

Vaughan, Serjt., then called the defendant's clerk, who proved that the hoghead in question was rolled in his presence to within three or four yards of the vessel; that his attention was called away for some time, and when he returned he did not see it there; that he entered it as shipped, supposing it to be so;

that he could not say whether or no the mate was immediately on the spot at the time, but that the men were.

Vaughan, Serjt., then proposed to ask a wharfinger this question: "What is the usage with respect to goods that are going coastwise as to the mode of delivery into the hands of the captain or mate?

Wilde, Serjt., objected.

Vaughan, Serjt., mentioned again Cobban v. Down, before cited.

BEST, C. J. On the authority of this case I shall receive the evidence of the

usage.

The witness then stated the usage to be, for the wharfinger to receive the goods and keep them dry, and then for the ship's company to come and roll them to the ship, and for one of the clerks to take an account of their being placed at the quay-side, to be taken to the ship, and that, from such time, the ship's company were considered to *take the charge. On his cross-examination, he said, "We deliver to the mate of the ship."

BEST, C. J. I am of opinion that this is an usage abundantly in favor of the wharfinger, and that it ought not to be extended. If it could, a delivery might be to a cabin-boy. A wharfinger must prove, by distinct evidence, that he

delivered to the mate or an officer of the ship.

Vaughan, Serjt. Not into his hands, I presume. The mate, in this case, was, it appears, superintending the loading.

Wilde, Serjt., then replied.

Best, C. J., called up the mate, who said, in answer to a question put by his Lordship, that he took all the casks of tallow on board which were pointed out to him.

His Lordship, then, in his charge to the jury, observed—The only question in this case is, has the cask in question been lost through the negligence of the wharfinger, or of the master or mate of the ship? It is the duty of the wharfinger to see that goods sent to him go by some ship or other. It is not by his servants that they are put on board, but he is to see that they are removed by the crew of the ship. I question if the case which has been cited is not a little too narrow. But that case decides that there must be a delivery to the master or mate; and I should hope that a wharfinger never will be held to have done his duty, if he delivers to one of the crew only. He must deliver to some one in authority. The clerk to the defendant should have stood by and seen the cask taken on board, and then entered it. His evidence does not prove a delivery to some one in authority. There are cases in which a delivery even to the mate will not do. Suppose *the mate cannot take the goods in in one day, and they are obliged to remain till the next, no man in his senses will say that the wharfinger is not responsible during the intervening time. In my opinion, it is the duty of the wharfinger to say, "There, mate, are your casks, take them on board." If the case strikes you so, then, the plaintiff is entitled to a verdict, for the wharfinger has not done his duty. Verdict for the plaintiff

Wilde, Serjt., and Parke, for the plaintiff.
Vaughan, Serjt., and E. Lawes, for the defendant.

[Attornies—Stade of J., and Clark, F. & C.]

GILLMAN et al. v. ROBINSON.

If a tradesman living in the country receive goods, ordered on his behalf by a person is London, and pay for them in several instances, he is liable for goods furnished on an order given by such person afterwards, though he did not receive them, such person having appropriated them to his own use.

Assumest for goods sold.

The plaintiffs resided in London, and the defendant at Driffield, in Yorkshire. A man, named Womack, ordered the goods on behalf of the defendant, but intercepted them on their way, and applied them to his own use. Womack had bought goods of the plaintiffs, as well as of other houses, several times before, as the agent of the defendant, for which the defendant had paid.

Vaughan, Serjt., for the defendant, submitted, that he was not liable. It would be most mischievous to hold, that because I give an agent authority to purchase for me, it is to give him an unlimited power to use my name, and pledge my credit to any extent. Suppose I admit the proof that there was employment in certain specific instances, yet a jury are not, thereby, warranted in finding *the existence of an unlimited authority, nor is it, indeed, any evidence to go to them of such a fact. General agency may be presumed in cases of underwriting policies of insurance, or drawing bills of There, if the act be done in several instances, it is enough; for the nature of the transaction is such, as to raise the inference of authority. But the case of ordering goods is different. It may apply to an agent abroad: and is a man's credit to be pledged all over Europe? It is better to suffer a private mischief than a public inconvenience; and nothing is so mischievous and inconvenient as to imply a general authority from a few specific instances. Non constat, but in those instances in which the defendant recognized the dealing, Womack had a particular authority.

BEST, C. J. There is abundant evidence to go to the jury. I agree that one transaction is not enough to raise the presumption of general authority, but several instances are, I think, sufficient. This case cannot be distinguished from the cases of master and servant, unless the jury should be satisfied that Womack's authority was terminated at the end of each transaction. One of two innocent persons must suffer for the fraud of a third. The defendant should have notified that his authority only applied to the particular transaction; and if he held out the party as his agent, and the seller trusted him upon that, the defendant is the one of the two innocent persons who ought to suffer.

From the evidence on the part of the defendant, it appeared that he gave Womack written instructions, by letters, as to what he was to buy for him.

Wilde, Serjt., replied. The question is not, what were the private instructions of the defendant to Womack, but how he sanctioned Womack in connection with the London houses. *The London houses would not, by the course of business, see the letters. They have no means of knowing whether a man is a general or particular agent, except by the way in which the principal acts. The defendant ought to have said, Do not trust Womack generally for me, but always ask him for his letters. Evidence can never go higher than this. Here is payment to several houses as well as the plaintiffs, for goods received through Womack's orders. Whitehead v. Tuckett, in 15 East, p. 400, decides, that private instructions cannot limit a general authority.

BEST, C. J. Upon principle, if a man holds another out to the world as his general agent, he is responsible for his acts; and it is important that it should be so, because, otherwise, a man might accredit another, and, after he had cheated many to their ruin, turn round and say, Though this man appeared as my agent, yet he had no authority from me. You must be satisfied, not only that the goods were ordered for the defendant, but that the authority of the party ordering them was so far recognized as to render the defendant responsi-

ble. It is admitted, that, in the cases of policies and bills of exchange, agency is proved by several instances. This feature in the law of agency is not confined to those cases, but applies equally and similarly to the ordering of goods.

Verdict for the plaintiffs.

Wilde, Serjt., and F. Pollock, for the plaintiffs. Vaughan, Serjt., and Parke, for the defendant.

[Attornies-Willis & Co., and Eyre & C.]

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*KERRISON v. COATSWORTH.

In an action for an injury done to a stage-coach by a cart, the coachman is not a competent witness for the plaintiff, without a release.

THE plaintiff was the proprietor of a stage-coach, and brought this action to recover damages for an injury done to his coach by the negligent driving of defendant's carter.

The man who drove the coach was called as a witness for the plaintiff.

Pell, Serjt., submitted that he must be released, on the authority of Morish v. Foot, 5 Moore, 508.†

BEST, C. J. My own opinion would have been the other way; but as the Court of Common Pleas have so decided, I am bound by their authority.

Holt mentioned that Mr. Justice Bayley, all through the Circuit, ruled in a

contrary manner.

BEST, C. J. 'The Court of Common Pleas having decided the question, the opinion of a Judge at *Nisi Prius*, however respectable, cannot justify me in ruling in opposition to that decision.

Wilde, Serjt., as amicus curiæ, mentioned, that the Court of King's Bench

had lately recognized the case of Morish v. Foot.

Verdict for the plaintiff.

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Vaughan, Serjt., and Holt, for the plaintiff.
 Pell, Serjt., for the defendant.

[Attornies-May, Sen., and Willey.]

† The case of Morisk v. Foot was an action for negligently driving a mail-coach against a horse, which was drawing the plaintiff's wagon, by which it was killed; and it was there held, that the plaintiff's wagoner was not a competent witness to prove that the accident was caused by the fault of the mail-coachman, without a release from the plaintiff; because, if the accident was caused by his own fault, the plaintiff might bring an action against him.

BRINLEY et al., Assignees of HORNE, a Bankrupt, v. KING.

The declarations of a bankrupt to a party with whom he is dealing, respecting his transactions in trade, are not evidence to prove the trading of such bankrupt.

Assumpsit, for wages due to the bankrupt, as master of an East India ship. Proof having been given of several sales to Horne, of goods to be exported— Wilde, Serjt., in answer to a question from Best, C. J., stated, that he relied upon such proof as establishing a trading.

BEST, C. J., intimated, that there must be evidence given of some act of

selling.

A witness was then called, who stated that he had had conversations with Horne before his bankruptcy.

Wilde, Serjt., put this question—" What did you learn from him in those

conversations respecting his transactions in trade?"

Pell, Serjt., objected. This is not a legitimate question, on the broad principle, that a bankrupt is not a competent witness to prove any fact which is necessary to support his commission. The declarations inquired after might be made in contemplation of bankruptcy.

Tindal, on the same side. The admissions of a bankrupt are received a necessitate, and only in equivocal *cases, as, for instance, to make out, when he was going in a coach, with what intent he was going. But

that which is now sought to be done, is beyond all rule.

Wilde, Serjt., contra. The declarations of a bankrupt are evidence to prove the petitioning creditor's debt. Declarations of motives are receivable, whether the acts are equivocal or not. If the admission of the bankrupt is receivable to prove the debt, why not to prove the trading? The admission I seek to give in evidence is not made by the man after he has done trading, but at the time of his dealing, and to the party with whom he is doing business.

Pell, Serjt.—The ground on which the acknowledgment of a bankrupt is evidence of what is due to the petitioning creditor is, that, at the time he makes

it, he is charging himself with a debt.

BEST, C. J.—I think it is a general rule, that nothing which a bankrupt says can be given in evidence to support his commission. But there are exceptions to this rule; and one is, when the declaration accompanies an act, because there is no other mode of explaining the act. Another exception is, where he makes admissions to decrease his estate. All that relates to the bankruptcy should be proved by other witnesses. Verdict for the defendant.

Wilde, Serit., and Chitty, for the plaintiffs. Pell, Serit., and Tindal, for the defendant.

[Attornies—Freeman & H., and Sweet & Co.]

See the case of Parker v. Barker, 3 Moore, 226.

*NORTON v. HERRON.

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If a man describe himself, in the beginning of an agreement to grant a lease, as making it on behalf of another, but in the subsequent part of it say that he will execute the lease, he is personally liable.

This was an action to recover damages for the breach of an agreement in the following terms:

"Memorandum of an agreement made this 14th day of April, 1824, between George Herron, on the behalf of Edward Barron, of the one part, and James Norton of the other part, to wit, first, the said George Herron doth hereby agree to execute unto the said James Norton a lease of all that messuage, &c., situate, &c., late in the possession of ———— Nicholls, to hold, from the 12th of May, being the half-quarter between Lady-day and Midsummer now next ensuing, for seven, fourteen, or twenty-one years, at and under the annual rent of 1301.," &c.

· A tenant, who was in possession, refused to quit, and the plaintiff could not obtain his lease.

Pell, Serjt., on behalf of the plaintiff, contended that the defendant had rendered himself personally liable, though he had described himself at the beginning of the agreement as making it on the behalf of another. He cited the cases of Appleton v. Binks, 5 East, 148, and Burrell v. Jones, 3 B. & A. 47.

Vaugham, Serjt., for the defendant, contended, that Appleton v. Binks did not apply, inasmuch as that was an action of covenant, and not, like the present, merely assumpsit. The terms, heirs, executors, and administrators, used in that case, show an intention to bind the heirs, &c., though the party is described as only agent. But, in the present case, all that the party says is,—I, as agent for Barron, agree that Barron shall grant a lease. The defendant has no interest in the subject-matter of the *agreement. It appears from the second case cited, that the parties intended to be bound personally, and that the word solicitors was mere description. It was evidently their intention to pay the money there sought to be recovered; but it could not be the intention of the defendant in this case to make himself personally liable. The rule of respondent superior applies wherever there is a known principal.

BEST, C. J. It is said, that as the defendant entered into the contract on behalf of *Barron*, therefore the action should be brought against *Barron*. The case of the deed is stronger than this: but the last case cited was that of a simple contract. In that it was held that the word solicitors was mere description, and I cannot distinguish between that case and the present; and I am of opinion that the agreement is binding on the defendant. The cases of brokers are different, because, there, the fact of agency is known to every one; but, in this case, the man, after describing himself as agent, goes on to

contract in his own name.

Verdict for the plaintiff.

Pell, and Wilde, Serjts., and F. Kelly, for the plaintif. Vaughan, Serjt., for the defendant.

[Attornies-T. Bennett, and Collingwood.]

ROWLAND v. ASHBY et al.

Evidence may be given by parol of material facts which transpired at an examination before Commissioners of Bankrupt, but which were not taken down in writing.

Assumpsir for goods sold.

It became necessary, in the course of the defence, to prove a partner-ship between the plaintiff and his son, who had been a bankrupt; and to do this, Wilde, Scrjt., asked the attorney who produced the written examination of the father under the commission, whether the father had not; at such examination, admitted the partnership?

Vaughan, Serjt., objected. They are concluded by the written examination, and cannot be allowed to give parol evidence of any thing in addition to it. This case is analogous to those which occur under the statutes of Philip and Mary in cases of felony; and, under those statutes, it would not be permitted to add any fact not taken down by the magistrate.

BEST, C. J. I shall presume, in the first instance, that every thing that was material was taken down; but if evidence is offered to me of the contrary, I

think I must receive it.

Wilde, Serjt., mentioned the case of one Peacock, who was tried for murder at Kingston, in which Rooke, J., (Garrow, B., being defendant's Counsel,) admitted parol evidence of something which passed before the Coroner, but which he had not taken down.

BEST, C. J. I think it is proper evidence to go to the jury. It is matter of strong observation to them that it is not likely any thing important did pass, or else it would have been taken down. I do not see how I can get over

receiving the evidence.

Vaughan, Serjt., and Richards, for the plaintiff. Wilde, Serjt., and Chitty, for the defendants.

[Attornies-W. Jones, and Stephens.]

OXFORD SPRING CIRCUIT.

1825.

BEFORE MR. BARON GARROW, AND MR. JUSTICE LITTLEDALE.

OXFORD ASSIZES.

(Civil Side.)

BEFORE MR JUSTICE LITTLEDALE.

BROWN v. TANNER.

Assumpsit lies for revoking a submission to arbitration, not under seal, before award made, although it contains no express agreement not to revoke, but only the words "agrees to stand to, abide, perform," &c., the award: and, in such case, the plaintiff may declare that the defendant agreed to stand to, &c., and that he would not revoke; and lay as a breach, that the defendant hindered the umpire from making his award, by revoking; with such counts, the plaintiff may join counts on the award, and the Judge, at the trial, will not put the plaintiff to elect which set of counts he will go upon: and if, in giving damages on the counts for revoking the submission before award made, the jury include the expenses of the award, the Court above will not grant a new trial, as such a mistake ought to have been mentioned at Nisi Priss.

Assumpsir. The first count of the declaration stated, that there had been an action commenced by the defendant against the plaintiff on the warranty of a horse, and that, on the 6th of April, 1824, an agreement was entered into by the parties, who agreed with each other, that each of them would "well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award. order, arbitrament," &c., of John Richmond and Joseph Lousley, so that they made their award before the 26th of April, in the year aforesaid; and in case they did not, that the parties would "well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award," &c., of Thomas Pocock, so that he made his award before the 10th of May: and that, in consideration thereof, and that the plaintiff had "undertaken to perform, &c., the said agreement, the defendant undertook, &c., to perform, &c., "and that he, the said defendant, would not revoke the said submission," or the authority of the said Vol. XII.—47

arbitrators and umpire, or prevent them, or any of them, from making an award. It was averred, that the time had elapsed without the arbitrators making any award, and that the umpire was ready to do so, yet, the defendant, not regarding, &c., before the time for the umpire to make his award had expired, to wit, on the 26th of April, revoked his said submission, hindered and prevented the arbitrators from making their award, and the umpire from making his umpirage, by means of which the plaintiff had lost, &c.

The second count was nearly similar, and stated the contract in the same way as the first count; but the breach was laid to be, that the defendant "wrongfully revoked his submission," so as to prevent the arbitrators and

umpire from making an award.

The third and fourth counts were on the award, and there were also the

common money counts. Plea-General issue.

The plaintiff's Counsel opened a case upon the award, but stated, that if the defendant set up as a defence to that, that he had revoked his submission, such defence would establish a case for the plaintiff on the first and second counts.

The defendant's Counsel insisted, that the learned Judge ought to put the plaintiff's Counsel to elect which set of counts he would go upon, as they were incompatible claims, and he therefore ought to go on the award as a good award; or if he said the submission was wrongfully revoked, if that was actionable, he might go on those counts, abandoning the others.

LITTLEDALE, J. If the counts cannot be joined, you might have demurred: but as the record is here, the *plaintiff may go on all his counts, and if, at the end of the cause, I think a case is made out on any one count, on that count, whichever it is, I must direct a verdict for the plaintiff.

The agreement of submission, dated April 6, 1824, was then put in. It was not under seal, and was a submission to "stand to, obey, abide, observe, perform, fulfil, and keep," the award of the arbitrators and umpire before mentioned, but it contained no express agreement that the parties would not revoke the submission, nor that they would not hinder the arbitrators or umpire from making their award.

The award, dated on the 5th of May, was also put in, by which the umpire awarded the defendant to pay to the plaintiff 19l. 18s., including the costs of

the reference and of the award.

For the defence, a deed executed by the desendant was put in; it was dated April 26th, and by it the desendant revoked the authority of the umpire; and a witness proved that this deed was read over to the umpire on that day.

LITTLEDALE, J., ruled, that, upon this evidence, the plaintiff was entitled to a verdict on the first and second counts, on the authority of *Vynior's* case, 8 Co. 82 a., and that the proper measure of damages, for such injurious revocation, was the sum the plaintiff would have received if the defendant had not so revoked.

Verdict for the plaintiff—Damages 191. 18s.

Taunton, and Chilton, for the plaintiff. Curwood, and Carrington, for the defendant.

[Attornies-Hollier, and Sheen.]

*COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., GRAHAM, GARROW, AND HULLOCK, BS.

In Banc.

Carrington moved for a rule nisi, for a new trial: 1st, because the Judge ought to have put the plaintiff to elect which set of counts he would go upon, the two sets of counts being for incompatible claims. If it had appeared in the record that it was the same submission that the defendant was charged with revoking in one set of counts, while in the others he was sued for not obeying a good award made upon it, that would have been a good ground of demurrer; and the learned Judge ought not to allow a party, at the trial, to go upon claims so contradictory that he could not state them in his declaration. The present declaration could not be successfully demurred to, because, non constat, but there were two submissions, one followed by an award, and the other revoked before award made. The practice at the trial is assimilated to the rules of pleading; what is a departure in pleading is a variance at the trial, and the like.

HULLOCK, B. You had better proceed to your next point. In declarations, it often happens that the claims in different counts are incompatible. You declare on a bill, and if that fails, you may resort to a count for goods sold, which were the consideration of it; these are incompatible, for if the bill is

good, you can have no claim for the goods.

Carrington. A second point is, that, as the submission was not under seal, and as there was no express agreement not to revoke, the recal of the authority of the umpire was not a ground of an action. 3d. That the declaration was not supported by the evidence, the declaration stating an agreement to submit and on the part the breach was no evidence of the latter part of it, and on that part the breach was assigned. And, 4th, That the learned Judge directed the verdict for too large a sum, as the 19l. 18s. included the stamp on which the award was written. Now, as the award was after a revocation, the defendant could not, at any rate, be charged with that.

The Court granted a rule nisi.

The learned Judge's report having been read, their Lordships held, that the error in amount of the damages ought to have been mentioned to the Judge at the trial; and it ought not to be made the ground of the great expense of a new trial, that the verdict was taken, by mistake, for 30s. or 40s. too much.

Taunton and Chilton showed cause on the other points. Every submission to award contains an implied promise not to revoke, which the party breaks by revoking such submission. If a party agrees to stand to an award, and puts it out of his own power to do so, he is as much guilty of a breach of the agreement as if he lets the award be made and then disobeys it. It has been long settled, that if a party agrees to do a thing, and by his own act makes it impossible, he thereby breaks his agreement.

ALEXANDER, C. B. I will put this case: Suppose a man revoke his submission for due cause, as that he finds out that the arbitrator had secret meetings with the opposite party, would he then be liable on the implied as-

Taunton. I apprehend he would, but that would go in mitigation of

damages.

ALEXANDER, C. B. It can hardly be law, that if a man finds out, just in *656] time to save himself, that he has *trusted people, who are grossly misconducting themselves, that he is obliged to pay them damages and costs, because he deprives them of an authority that they are abusing.

Carrington, in support of the rule—There is no case of an action for revoking a submission which was not under seal, and in no case is this implied assumpsit ever mentioned. In Vynior's case, 8 Co. 82 a., it is laid down, that a submission is in its nature revocable, though it is made irrevocable by its terms; if it is by obligation, the penalty becomes single; but if it is without obligation, the party "shall lose nothing, for ex nuda submissione non oritur actio;" and for this the Year Book, 5 Edw. 4, 3 b, is cited, which goes to exactly the same effect as does Bro. Abr. tit. Arbitrament, pl. 35: and in the judgment of Gibbs, C. J., in the case of Lee v. Joseph, 5 Taunt. 452, that doctrine is also recognised. In the case put by my Lord Chief Baron of cheating arbitrators, it is absurd to contend that a party would be liable to an action of assumpsit; and I submit that a submission, not under seal, is in law an authority, and, like every other authority, it is lawfully revocable, and that, for revoking it per se, no action lies; but that if a party, by an injurious revocation, causes damage to the opposite party, he is liable, in a special action on the case, for the exercising of a lawful power to the injury of another, on the principle of the rule sic utere tuo, &c., there being many cases where a party is liable to an action on the case for doing a thing in itself lawful, but which works injury to another, as in cases of nuisance, and the like. point is, that the evidence does not support the declaration. The first and second counts state an agreement to stand to, &c., and not to revoke, and the breach is assigned on the latter part. Now, the agreement in evidence did not contain any stipulation not to revoke, and was therefore materially different from the agreement stated in the declaration. It has been said, that if a party agrees to stand to an award, *and by his own act prevents any from being made, he breaks his agreement. But, then, the plaintiff should bave declared on it as a second of the second have declared on it as an agreement "to stand to the award," and have laid it as a breach, that the defendant did not "stand to the award:" and if, at the trial, the plaintiff had given such facts in evidence, as, in the opinion of the learned Judge, would support that breach, he would be entitled to a verdict.

ALEXANDER, C. B. We shall consider of this case.

The Court now gave judgment on the application for a new trial.

ALEXANDER, C. B. This was an action against the defendant upon an award. The parties agreed to refer to two arbitrators, so that they made their award by a certain day, and if they did not make any award in time, it was then to go to an umpire. Before the umpire had made his award, which he did on the 5th of May, the defendant, by a deed, dated on the 26th of April. revoked the authority of the umpire. This action was brought for the defendant's not standing to, and abiding by, the award of the umpire, and we think the verdict should not be set aside. We think the action maintainable in its present form. In Vynior's case, we find that a submission is countermandable, but that, on a countermand of it, the obligee shall take the benefit of the bond, because the other party does not "stand to, and abide" by, the award; and if one prevents an award, he thereby breaks his agreement to "stand to. and abide by, the award." In the very recent case of Warburton v. Storr, Lord Chief Justice Abbott went upon that doctrine. If a man makes a condition impossible, he thereby makes himself liable to the penalties of a non-performance of it. In this agreement of reference, we find the words "stand to, abide, and *perform," and we therefore think the rule should be dis-

Carrington. The Court intimated, at the time of the argument, that there might be some ground for reducing the damages, because the expenses of the award were included.

ALEXANDER, C. B. That point has been considered, and we think the verdict ought to stand.

Rule discharged.

WORCESTER ASSIZES.

(Crown Side.)

BEFORE MR. BARON GARROW.

REX v. CHARLES CRUMP.

If a person stealing other property, take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony.

This prisoner was indicted for stealing a horse, three bridles, two saddles, and a bag, the property of *Henry Bateman*.

It appeared that he got into the prosecutor's stable, and took away the horse and the other property all together; but that, when he had got to some distance, he turned the horse loose, and proceeded on foot to *Tewkesbury*, where he was stopped attempting to sell the saddles.

Garrow, B., left it to the jury to say, whether the prisoner had any intention of stealing the horse; for that, if he intended to steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and, as it were, borrowed the horse for that purpose, he would not be, in point of law, guilty of stealing the horse.

Verdict-Not guilty of stealing the horse-Guilty of stealing

the rest of the property.

WORCESTER CITY ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE LITTLEDALE.

R. BINT v. LAVENDER.

T. BINT v. Same.

W. PITTS v. Same.

Semble, that a jailor bringing a prisoner out of his county, to be present at the trial of an information on the game laws, in which he is defendant, without having a habeas corpus or Judge's order for that purpose, is liable to an action for false imprisonment, at the suit of such prisoner.

SEE ante, p. 439.

These were three actions, for false imprisonment, against the Keeper of Worcester County Jail, for imprisoning the plaintiffs in the city of Worcester,

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through which he brought them in custody, to be present at the trial of the informations in the case of *Davies* v. *Bint and Others*, the defendant not having a writ of *habeas corpus* or a Judge's order for that purpose. Plea—General issue.

A verdict by consent was taken in each case for the plaintif, with nominal damages and full costs.

Curwood, and Carrington, for the plaintiffs. Jervis, Taunton, and Russel, for the defendant.

[Attornies—Gowland, and Robeson.]

*HEREFORD ASSIZES.

F*660

(Crown Side.)

BEFORE MR. JUSTICE LITTLEDALE.

REX v. HOBBY.

Practice.—The notice of a defendant's intention to try a traverse is not a condition precedent to its being tried, and the prosecutor, if he appears, aids all defects in it; and he is not allowed to appear for the purpose of objecting to the notice.

PERJURY.

The defendant had traversed the indigtment to the present assizes.

Cross, for the prosecution, objected, that the defendant had given no sufficient

notice of his intention of trying his traverse.

Ludlow, and Maule, contra, argued, that the prosecutor appearing by his Counsel, aided all defects that there might be in the notice, for that there was no law requiring any notice, but it was a mere regulation of practice, because the case should not be taken behind the prosecutor's back and by surprise upon him.

Cross. In parish appeals, nothing is more common than for Counsel to attend, merely to object to the notice, and if it was not so in this case, the defendant would take an acquittal, because no one appeared to object to the

notice being insufficient.

LITTLEDALE, J., (having conferred with GARROW, B.) This notice is not a condition precedent to the party being tried, and if any one appears for the prosecution, that aids all defects in the notice. The notice is merely to apprise the prosecutor that the defendant intends to enter the *traverse for trial. [*661 And if the defendant gave no notice at all, and the prosecutor expecting the case to come on appeared, the defendant might still take his trial; and the prosecutor in this case must either appear or not, and if he appears for one purpose, he must appear for all.

The trial then proceeded, and the defendant was

Acquitted.

Cross, for the prosecutor.

Ludlow, and Maule, for the defendant.

[Attornies—Pateshall, and Spencer.]

GLOUCESTER ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE LITTLEDALE.

REX v. CODRINGTON.

If one professes to sell an interest in property, and receives the purchase money, the vendee taking the usual covenant for title, and it turns out that the vendor has in fact previously sold his interest in the property to a third person. This is not sufficient to support an indictment for obtaining money by false pretences.

INDICTMENT for obtaining money by false pretences. The indictment (which was extremely long) charged that the defendant obtained the sum of 291. 3s., by falsely pretending to a person named Varlow, that he was entitled to a reversionary interest in one-seventh share of a sum of money left by his grand
*662] father, whose name was Wickes; *whereas in fact he was not entitled to any interest in any share, &c., negativing the pretences. Plea—
Not guilty.

It was opened, that the defendant pretended that he was entitled to the reversionary interest mentioned in the indictment, and thereby induced Varlow, the prosecutor, to purchase it on the 22d December, 1824, at the price of 29l. 3s., the defendant having in fact sold all his interest in it to a person named Pick, at the 18th of September 1884.

on the 18th of September, 1824.

To prove the pretence, a deed dated December 22, 1824, assigning the defendant's interest in his one-seventh share of the money to Varlow, was put in, and in this deed there was the usual covenant for title.

Ludlow objected, that this deed was no evidence of any false pretence, for

if it was, every breach of every covenant would be indictable.

LITTLEDALE, J. Certainly, a covenant in a deed cannot be taken to be a

false pretence.

The prosecutor was then called, and he proved that the defendant asked him to purchase a seventh share of some money that he would be entitled to under his grandfather's will on the death of one of his relatives, and that he agreed to purchase it, and got a deed of assignment executed to him, and he thereupon paid the defendant the purchase money.

To prove the falsehood of the pretence, the previous assignment by the

defendant to Pick was put in.

Ludlow objected, that the prosecutor did not advance the money in consequence of the verbal pretence used by the defendant, but took the covenant as his security. What passed between the parties by parol was afterwards embodied in the deed; it was a mere breach of covenant.

*663] Palmer, contra. This indictment charges that the *defendant obtained the money by pretending that he was entitled to this reversionary interest. That pretence we prove to be false; and yet it is to be contended, that

because he reiterated that pretence in a deed, it becomes no offence.

Ludlow, in reply. It is not every thing which is untruly stated at the time of a bargain which is an indictable false pretence. If A. B. sold a horse, and warranted him five years old, and it were proved that to his knowledge he was but four; he might be indicted for swindling; or, to come nearer this case, if a man sold a piece of land as one hundred acres, without saying, "be the same

more or less," and in fact the land was only ninety-nine acres and a half, he

might be transported; this is really only a breach of covenant.

LITTLEDALE, J. The doctrine contended for on the part of the prosecution, would make every breach of warranty or false assertion at the time of a bargain, a transportable offence. Here the party bought the property, and took as his security a covenant that the vendor had a good title. If he now finds that the vendor has not a good title, he must resort to the covenant. This is only a ground for a civil action.

Verdict-Not Guilty.

Palmer, for the prosecutor.

Ludlow, and Justice, for the defendant.

[Attornies, ——, and ——.

(*Civil Side.)

[*664

BEFORE MR. BARON GARROW.

BARTON et al. v. CORDY.

If parties having a right to a garden, have given another notice not to trespass there, and afterwards they give that person half a year's notice to quit "all gardens held of them" at a time later than all the alleged trespasses, they can bring no action for such trespasses, because they have since acknowledged the defendant as their tenant.

TRESPASS quare clausum fregit.

Plea—General issue.

The alleged trespass was proved to have been committed in a garden in which the defendant's cottage was situated, and it appeared that the cottage, garden, and a piece of land had belonged to the defendant's wife, who had a power of appointment; and that, for a sum of 90l. she had executed an appointment in favor of one James Mallet, in fee, reserving to her husband and herself a right of occupying the cottage for their lives. Mallet had become insolvent, and had assigned all his property to the plaintiffs for the benefit of his creditors; and they, on the 18th of May, 1824, gave the defendant notice not to trespass in the garden.

The trespass was, that the defendant was seen digging in the garden at seve-

ral times in the year 1824.

The defence was, that, since all the trespasses, the plaintiffs had treated the defendant as a tenant, and therefore they had precluded themselves from treating him as a trespasser.

A notice signed by all the plaintiffs was put in; it was dated on the 18th of March, 1825, and it gave the defendant notice to quit "all and all manner of garden ground that he held of them," at Michaelmas, 1825.

Some evidence was offered to show that the defendant had two gardens, but

that failed.

*Garrow, B., observed, that, from this notice, it appeared that the plaintiff treated the defendant as a tenant after the alleged trespasses,

and his Lordship doubted whether he ought not to nonsuit; however, he would ask the jury what damages they would give, and allow the defendant's Counsel to move to enter a nonsuit.

Verdict for the plaintiffs, with nominal damages.

Thunton, and Ludlow, for the plaintiffs. Curwood, and Russel, for the defendant.

[Attornies—Bloxsome & Wells, and Ward.]

COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., GRAHAM, GARROW, AND HULLOCK, BS.

In Banc.

In the ensuing *Easter term*, *Curvoood* moved for leave to enter a nonsuit, and the Court granted a rule nisi.

Taunton now showed cause. The notice to quit was a surprise on the plaintiffs, and in fact applied to another garden which was held by the defendant. The plaintiffs had the right of possession, as was proved by their title deeds, and they had given a notice not to trespass; and after that it ought hardly to be held that the notice to quit could apply to the same garden in which they had given a previous notice not to trespass.

Curwood, and Russel, contra, were stopped by the Court.

*ALEXANDER, C. B. It is conceded, that if this notice applied to the garden in question, a nonsuit ought to be entered. Therefore, it becomes a question whether the notice is large enough to include the place in question. By its terms it includes all gardens. I think a nonsuit must be entered.

GRAHAM, B. It is hard to conceive that any person could be so foolish as to give such a notice as would defeat his own action; but if he has done so, the Court cannot help him. Even if there were two gardens, the defendant was in possession of both, and as the notice is to deliver up all gardens, it would

apply to them both.

Garrow, B. I believe in my conscience that no one ever heard of this poor man having two gardens, till the exigency of this case made it necessary. My learned brother has said that it was foolish to give such a notice as this, but some wise persons like to have two strings to their bow. 'Get rid of this man we will,' said Mr. Wells, 'and if we cannot make out this to be a trespass, we will give him a notice to quit, and get him out by an ejectment.'

HULLOCK, B., concurred.

Rule absolute for entering a nonsuit.

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*REX v. THOMAS HILL.

Since the stat. 7 & 8 W. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the bystanders.

INFORMATION in nature of a quo warranto, calling on the defendant to show by what authority he exercised the office of a burgess of the borough of Monmouth.

This was a special jury cause, and only eight special jurors appeared.

Taunion, for the relator, prayed a tales.

The common jury panel was called through, and only two common jurors

appeared.

The counsel for the relator asked to have talesmen necessary for the completion of the jury taken from the bystanders, and contended that the case of the King v. Dolby, 3 Dow. & Ryl. 311, only proceeded on the ground that but one coroner summoned the talesmen; and further, that if his Lordship did not think that course right, he would adjourn the case to give time to procure the attendance of other jurors.

The Counsel for the defendant argued, that, under the stat. 7th and 8th of Wm. 3, c. 32, s. 3, the talesmen could now only be persons who were summoned as jurors to try the other causes, and could not be now taken from the

mere bystanders.

GARROW, B. At the beginning of this assizes seventy-two persons were summoned as jurors to try the whole of the causes; and in this case there not being a sufficient number of special jurors, and a tales being prayed, any of those persons who appeared might serve as talesmen on this jury; but, since the statute, I think no other persons can. I have been asked to order other jurors to be summoned, but I have not any authority to make such an order. The cause must, therefore, stand over to the next assizes.

The cause was then made a remanet.

*Taunton, Ludlow, and Cross, for the relator.

Campbell, Russell, Philpotts, and Carrington, for the defendant.

[Attornies-Powles & Tyler, and Bryan.]

REX v. TIPPING.

On the trial of an information in nature of a quo warranto, which has been made a specia jury cause, jurors who have been summoned to try the prisoners on the crown side of the assizes are not thereby qualified to act as talesmen.

An information in the nature of a quo warranto, calling on the defendant to show by what authority he exercised the office of a burgess of Monmouth.

This was also a special jury cause.

In this case also only eight special jurors appeared; and on *Taunton* for the relator praying a tales, four of the jurors who were summoned on the crown side of the assizes, for the trial of the felonies, but who were not on the common jury panel on the civil side, appeared.

Ludlow suggested that those jurors were summoned to try issues joined between the crown and the subject, and that therefore they might serve as

talesmen.

Garrow, B. I think they cannot serve. This cause must also stand over.

· This cause was then made a remanet.

Taunton, Ludlow, and Cross, for the relator.

Campbell, Russel, Philpotts, and Carrington, for the defendant.

[Attornies-Powles & Tyler, and Bryan.]

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*ADDENDA.

COURT OF KING'S BENCH.

BEFORE BAYLEY, HOLROYD, AND LITTLEDALE, JS.

(Who sat under the King's Warrant.)

JONES v. JOHN WILLIAMS.

See ante, p. 459. The rule for a new trial in this case now came on to be

argued.

Taunton, and Campbell, showed cause, and argued that by the charter in this borough the aldermen were empowered to appoint deputies, and as the aldermen were to act as justices of the peace, their deputies could exercise all the functions of their office in the same manner as the aldermen themselves. Molins v. Wetby, 1 Lev. 76. And a deputy must exercise the whole powers of his office. Parker v. Kett, 1 Salk. 96. According to the doctrine of the other side, the deputy would be only so of half the office, that is, of the ministerial and not of the judicial part of it. The aldermen are to act as justices; this is not that two offices are to be held by one person, but that the person holding the office of alderman is to have additional powers. Judicial officers may appoint deputies under express authority in the charters of the crown, of which the Recorder of London is an instance.

BAYLEY, J. All the charters of the city of London have been confirmed by act of Parliament.

Taunton. Another point is, that being at most only a deputy justice, the

defendant was not entitled to notice *of action; but though the word deputy-justice does not occur in the statute which directs notices of action, it is clear that every justice, de facto, is entitled to such notice.

Godson, in support of the rule.—It ought to be observed, that, in this case, the alderman is not to appoint a deputy generally, but only, for executing his office of alderman. And he then argued, that even the King could not allow a private individual to appoint a justice: and he cited the statute 27 Hen. 8, c. 24, s. 2, which enacts, that no person or persons shall have any power or authority to make any Justices in Eyre, Justices of Assize, Justices of the Peace, or Justices of Jail Delivery, but that all such officers and ministers shall be made by letters patent under the King's great seal; and Vin. Abr. tit. Prerogative of the King, (M. b.) pl. 21, page 89; and Com. Dig. tit. Officer.

Holroyd, J. The King gives the burgesses a power to appoint aldermen

who are justices.

Godson. But I take the distinction to be between a body corporate and a

single individual.—(He was then stopped by the Court.)

BAYLEY, J. This question turns partly on the power of the Crown to enable an individual to appoint a justice, and partly on the terms of the charter. It is not necessary to decide, whether the act of Parliament (27 Hen. 8) has taken away from the Crown the power of giving such an authority; my present opinion is, that the act of Parliament has that effect; but if it has not, the words of the Crown must be most clear: and, considering the powers of a justice of the peace, and that the execution of that office so much depends on the talent and integrity of the party holding it, there ought to be a selection made *by some persons having competent authority. The instances of the Recorder of London and the judges of Wales have been mentioned, but in both those cases the mode of appointing is confirmed by act of Parliament; and, besides, the power of appointing deputies is clearly given in distinct terms; but the language of this charter is such, that, even if the Crown had the power contended for, it appears that the Crown only meant these deputies to be deputies of the office of alderman only, and the position of the clauses in the charter clearly shows that. The powers of an alderman vary in different boroughs, but they always have superior rights to the rest of the burgesses. In this borough there are to be two aldermen; and if by death or amotion there be a vacancy, an additional alderman is to be appointed. Now, every one of these, before he acts, is to take an oath, which is a hold on his conscience for the due performance of his office; and then there is a clause that the aldermen shall be justices. It is not the aldermen and their deputies, as it would have been, if the Crown had so intended; and we think the Crown has not given that power to the deputy which it has to the alderman. alderman must take an oath before he acts, he must have the qualification of being a burgess, and he must be elected by the other burgesses. Now, for a deputy, none of these things are necessary; and if the statute of Hen. 8th has not taken away from the Crown the authority of giving such powers, at least they ought to be given by most express words, and I therefore think that the nonsuit must be set aside.

Holroyd, J. By the charter, the original two aldermen and the additional one in case of death or amotion, are to be elected, and they are to act as justices of the peace; but it by no means follows that that becomes part of the office of alderman; it is, in fact, uniting two offices in the hands of one person. I do not know that an alderman, as such, has any known powers virtute offici; *but the aldermen generally have powers given them by the charter which directs their appointment, and these powers are over corporate [*672 matters, which can be executed by a deputy; and when we see that the King, in his charter, says, that the deputy is to execute the "office of Alderman," it is clear it was not intended that the deputy should act as a justice, even if the

statute of *Hen*. Sth has not taken away the power of the Crown to grant such authorities to constitute a justice of the peace; and the defendant, not being a justice, was clearly not entitled to notice of action.

LITTLEDALE, J., concurred.

Rule absolute for a new trial.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

GRAY and Another v. COX and Others.

SEE ante, p. 184 and 491. This case having been again argued, by J. L. Adolphus, for the plaintiffs, and Campbell, for the defendants, the Court now

gave judgment on the motion for a new trial.

ABSOTT, C. J., (after stating the nature of the case.)—On the general question, whether on a sale of goods for a specific purpose, a warranty is to be implied that they are reasonably fit and proper for that purpose, I continue to be of the same opinion that was expressed by me at the trial, although some of my Brother Judges are as strongly of a contrary opinion. We do not, however, feel ourselves called upon to decide that question; for, allowing that a serial person who sells a commodity for a specific purpose shall be taken, by law, to undertake that it was reasonably fit and proper for that purpose, yet the plaintiffs have not, in this case, declared on that implied warranty; as the declaration states, in general terms, that the defendants undertook that the copper in question should be good, substantial, and serviceable. Now we are all of opinion, that a warranty to that extent, and in those unqualified terms, could not be implied by law out of the circumstances attending the sale of an article like this, of which the defects were equally unknown to both parties at the time of the sale. The rule must therefore be made absolute.

Rule absolute for a new trial.

BEFORE BAYLEY, AND HOLROYD, JS.

Sitting under the King's Warrant, (Absente LITTLEDALE, J.)

BROMAGE and Another v. PROSSER.

SEE ante, p. 475. The motion for a rule for a new trial in this case having been argued, the court took time to consider, and

BAYLEY, J., now delivered the judgment of the Court. After stating the facts, as proved at the trial, his Lordship said-The learned Judge, at the trial, does not appear to have treated this as a privileged communication; but as if he considered that as the words were not spoken maliciously, though they had caused an injury, the defendant would be entitled to a verdict. If in a communication, not privileged, the question of malice was a question for the jury, the learned Judge's direction was right; but if, in such a communication, the malice is a conclusion of law, and the *Judge ought to withdraw that question from the consideration of the jury, then the direction was wrong. Malice, in common acceptation, means ill will, but its legal meaning is, wilful infliction of injury on another; as if I strike a man I never saw before, or poison a fishery, or do any act from which a general depraved inclination to mischief may be inferred. Russel, 614. So, if I traduce a man's character, whether I know him or not, or whether I intend to do him an injury or not, that is, legally speaking, malicious; the injury to him is equal, and a compensation ought equally to be given for it. However, it is laid down, that, in a declaration for words, the words need not be laid to be spoken malitiese. Styles, 392; Ow. 51; Noy, 35. In cases of privileged communication, such as statements made in giving characters to servants, or in confidential advice, malice, in fact, must be proved; but these have been always considered as excepted cases. In the case of Edmonson v. Stephenson, Bull. N. P. 8, Lord Mansfield appears clearly to have treated the former as an excepted case; and in Weatherston v. Hawkins, 1 T. R. 110, the plaintiff's Counsel (the late Mr. Baron Wood) stated that, in an action for a libel, it is not necessary to prove express malice, for if it be slanderous, malice is implied; and the same doctrine held in an action for words, where, though the declaration allege them to be spoken "falsely and maliciously," no express malice need be proved. Lord Mansfield says, that the general rules had been correctly stated by Mr. Wood, but took the distinction that the case then under consideration was peculiar, from its respecting the character of a servant: and Mr. Justice Buller says, that that is an excepted case, on account of the occasion of the making the communication: and in 3 T. R. 61, that learned Judge goes on the same doctrine. And in Hargrave v. Le Breton, one, &c., 4 Burr. 2425, it is laid down, that there must be malice, either express or implied. Had it been left to the jury in this case to say, whether the defendant had spoken what he did as *honest advice to the person to whom he spoke, it might then have been left to the jury to say, whether there was malice or not; but as this was treated as an ordinary case of slander, we think that the question of malice ought to have been excluded from the consideration of the jury; and we think (and my Brother Littledalk concurs in our opinion) that a new trial ought to be granted.

Rule absolute for a new trial.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

GREEN, Executrix of BOWERS, v. DAVIS. GREEN v. DAVIS.

SEE ante, pp. 451 and 452.

In each of these cases, Taunton had moved to set aside the verdict, and the Court having granted rules nisi, had directed the cases to stand over, that the parties might compromise them; however, both Taunton's rules were made absolute.

LEE v. LEVI.

Sez ante, p. 553.

Gurney and Chitty now showed cause against the rule; and argued, that a giving of time to the acceptor, whether before or after action brought, equally discharged the other parties to a bill, and that it was an equal injury to them whenever it was given.

*Brougham, contra, contended, that, after action brought, nothing exonerated the other parties to a bill except an actual payment of it.

ABBOTT, C. J. We shall take time to consider of this point.

HARTLEY v. CASE.

See ante, p. 555.

Brougham and Manning now showed cause against the rule; and contended that the notice of dishonor was given too soon, as the refusal to pay was at most only conditional, and the party had the whole day to pay the bill, and that the notice of dishonor was clearly insufficient; a notice ought to tell the party of the fact, which is to be brought to his knowledge, and not merely leave him to find it out, because he would not be liable to be sued unless a dishonor had taken place.

Scarlett, Holt, and Chitty, contra. The paying of a bill on the day it becomes due, but after actual dishonor, is no better than paying it at any time before action brought; and the earlier a party gives notice of the dishonor, the better it is for the person to whom it is given, as he thereby is put on his guard the earlier that he may get his money out of the hands of the acceptor. After an actual dishonor, the party may give notice without waiting to the end of the day, and the presentation may be at any part of it. Leftley v. Mills, 4 T. R. 170. And as to the notice of dishonor, that need not be in any particular form of words; and if it lets the party know that the bill has not been paid, that is sufficient.

ABBOTT, C. J. Certainly no precise form of words is *necessary for a notice of dishonor, but it must convey distinct information to the drawer of the bill that it has been dishonored.

BAYLEY, J. The general rule, no doubt, is, that you should give notice of the dishonor of a bill on the day after the bill has become due; and it is not necessary to decide whether a notice given on the day of the dishonor is good;

for the notice, in this case, if it had been given on the usual day, would clearly not have been sufficient.

HOLROYD and LITTLEDALE, Js., concurred.

Rule discharged.

COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., GRAHAM, GARROW, AND HULLOCK, BS.

In Banc.

HAYWARD v. GRANT.

SEE ante, p. 448.

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- If a written agreement is not signed by the defendant, the plaintiff need not give it in evidence, though he himself has signed it, and it regards the matter in issue. Wilson v. Bowie.
- 2. In an action for work and labor, when the plaintiff has established a quantum meruit, if the defendant's witness prove the existence of a written contract, and the plaintiff insist on the defendant's producing it, and it is not produced, the plaintiff must be called; but if the plaintiff does not require its production, the case may proceed. Damer v. Langton.
- to pay for the hire of the horses, though 3. If a defendant has signed a paper, in which he says, "I agree that my daughter shall perform, &c., this season, and I consent that she shall enter into articles for three following seasons," an action lies on the first part for the bare non-performance, but the latter part is a mere consent and not an agreement. and Another v. Paton.
- person in London, and pay for them in 4. If the attornies on both sides, on an indictment against a parish for not repairing a road, enter into an agreement, in which one "agrees on the part of the parish, to pay the costs," this agreement is personally binding on the attorney-And if it is agreed that A. B. shall tax

'2 H Vol. XII.—49 (385) the costs, it is no answer to an action for the costs, that the defendant had no notice to attend the taxation; if he did not object to that when he was first apprised of the taxation having taken place in his absence. Watson and Another v. Murrel.

5. In an action on an agreement for not accepting a lease, if it appear that there was a person who had an interest in the premises, and it be not proved at the trial that such person was a party to the lease tendered, the plaintiff cannot recover. Rumball v. Wright.

ANNUITY.

If a bond to secure an annuity contain a recital of the payment of the consideration, and the annuity has been paid for several years, the actual payment of the consideration will be presumed, though there be no receipt indorsed, and though the subscribing witness have no recollection of the subject. Haslam, Administrator of Plaiston, v. Diggles.

APOTHECARY.

4. Administering medicines while in the service of another person, as an apothecary's assistant, is not a practising as an apothecary, within 55 G. 3, c. 194, s. 22, though the person so administering the 3. In assault, battery, and imprisonment, medicines is himself paid for them. the defendant justifies the whole; if by Brown v. Robinson. 264

2. To prove that a person has passed his examinations at Apothecaries' Hall, under the stat. 55 G. 3, c. 194, it is sufficient to produce the certificate of examination and fitness, (which is given to every one who is approved by the examiners,) and prove the signature of one of the examiners to it. By that statute no apothecary can recover his charges in a Court of Law, unless he prove at the trial that he was in practice prior to, or on the 15th of August, 1815, or has obtained a certificate to practise from the Apothecaries' Company. Walmisley v. Abbot. 309, 495

3. In an action of debt on the Apothecaries' Act, 55 G. 3, c. 194, s. 20, for practising without having obtained a certificate from the Apothecaries' Company under that act, it is not necessary on the part of the plaintiffs to prove that the party has not obtained his certificate, the onus probandi lying on him to show that he has. It must, however, be averred in the declaration, that he has not. Apothecaries' Company v. Bentley.

penalties for attending several patients. Ouære. Ibid.

5. An apothecary who furnishes medicines and brings an action for the price of under the 55 G. 3, c. 194, cannot recover even for the phials in which the medicines were contained. Steed v. Henky.

ARREST.

Words, such as "I arrest you," per se, will not constitute an arrest; but if, after the words of arrest, the party goes with the officer, and so acquiesces, it is an arrest. Russen v. Lucas and Another, Sheriffs of Middlesex.

ASSAULT.

See WITHESS, 16.

1. If a person enter a house with force and violence, the person whose house is entered, may justify turning him out, (using no more force than is necessary,) without a previous request to depart. But if the person enter quietly, a request to depart is necessary before turning him out Tullay v. Read.

2. In assault, where there is a justification of molliter manus to all the counts in the declaration, the plaintiff cannot be admitted to prove excess, unless he has new assigned: otherwise, where there is a justification pleaded to one count, and the general issue to another. Bowen v. Parry.

> the defendant justifies the whole; if by the evidence it appears that the defendant improperly knocked the plaintiff down in addition to putting him in irons, the plaintiff cannot recover; as, if he meant to admit that all was proper except the knocking down, and to proceed for that only, he should have new as-381 signed. Gale v. Dalrymple.

ASSIGNEE.

See BANKBUPT, 18.

ATTESTATION, PROOF OF. See Evidence, 21.

ATTORNEY.

1. The executor of an attorney suing for an attorney's bill due to the deceased, need not deliver it a month before bringing an action for it. Barret and Wife. Executor and Executrix of Cuppage, v. Moss.

4. Whether a party incurs one or several 2. An attorney is bound to disclose communications made to him which do not regard either the bringing or the defending of an action. Williams and Others
v. Mudie and Others. 158

them, not being in a capacity to recover 3. An attorney having been employed for a

man by his father to defend an action; if he knew of his retainer and did not disapprove of it, he is bound by the acts of such attorney in the same way as if he had himself employed him. Cameron v. Baker. 268

4 A knowledge of a client's handwriting, obtained by his attorney from having witnessed his execution of the bail-bond in the action, is not such a confidential knowledge as to privilege the attorney from answering when called, on the part of the plaintiff, to prove the defendant's handwriting on the trial. Hurd v. Moring. 372

Let In an action on an attorney's bill against two defendants, it is not sufficient to prove a joint employment, and a joint promise to pay after the delivery of the bill, but it must be shown that the business was done for the joint benefit. If A. and B., being arrested on a bill of exchange, of which one is drawer and the other acceptor, go to an attorney, and request him to defend them, and he does so on their joint application, there is sufficient consideration to support a joint promise to pay, and consequently to sustain a joint action by the attorney against them. Hellings v. Gregory. 627

An attorney's bill for business done in the Insolvent Debtors' Court, is a taxable bill, and to entitle him to recover its amount, it must have been signed by him, and delivered a month before action brought under the statute 2 G. 2, c. 23. Smith, Gent., one, 4c., v. Wattleworth. 615

AWARD.

Assumptit lies for revoking a submission to arbitration not under seal before award made, although it contains no express agreement not to revoke, but only the words, "agrees to stand to, abide, per-&c., the award. And in such case, the plaintiff may declare that the defendant agreed to stand to, &c., and that he would not revoke, and lay as a breach that the defendant hindered the umpire from making his award by revoking; with such counts, the plaintiff may join counts on the award, and the judge at the trial will not put the plaintiff to elect which set of counts he will go upon; and if, in giving damages on the counts for revoking the submission before award made, the jury include the expenses of the award, the Court above will not grant a new trial, as such a mistake ought to have been mentioned at Nisi Prius. Brown v. Tanner.

BAIL

See Conorum, 1.

A person cannot maintain an action for his

trouble and loss of time in going to a place to become bail for another. Reson v. Wirdnam.

BANK OF ENGLAND.

If the Bank of England make unreasonable delay in the passing of a power of attorney to transfer stock, an action lies against them. Sutton, Bart., v. The Bank of England.

BANKRUPT.

See Ownership, Reputed.—Seeriff, 4.—WITHESS, 5.

 Denial to a collector of king's taxes is as much an act of bankruptcy as denial to any other creditor. Sanderson and Others, Assignees of Barge, v. Laferest and Others.

A bankrupt can never be a witness to prove his own act of bankruptcy. *Ibid.* Whether a letter written by him within a few days after the supposed act of bankruptcy, is evidence—Quere. *Ibid.*

A trader's absenting himself from ANY
place with intent to delay a creditor, is an
act of bankruptcy; and it is immaterial
whether a creditor be actually delayed or
not. Hallen v. Homer.

5. An agreement between a bankrupt and a third person, that the bankrupt shall receive a sum of money from such third person on his obtaining from his assignees the sale of his house to that person at a certain price, is void in law.

M. Shone v. Gill. 149

Whether the assignees of a party who has become bankrupt, can recover a debt due from the defendant, if the bankrupt, before his bankruptcy, agreed to set it against a debt that he owed the defendant's brother, such arrangement not being in writing—Queere. Cuxon and Others, Assignees of Sweet, v. Chadley.

174, 485

7. A creditor has a right to call on his debtor for his money at the debtor's lodgings, or other place, where he knows him to be, though it is not his place of business. And a denial to a creditor there is as much an act of bankruptcy as if it were his place of business. Park and Others v. Prosser.

 If a trader absents himself from any place to avoid a creditor, it is an act of bankruptcy. Curteis and Another v. Willis.

9. In an action against annuity brokers (who have become bankrupt) for laying out the money of the plaintiff on bad security, the solicitor under their commission is compelled to produce their books under a subpana duces tecum. And an entry in their ledger is evidence, though the witness who produces it, did not make the entry; and the solicitor under their commission is compelled to produce the ledger containing the account between them and the person to whom they advanced the money, to show that they knew him to be in an insolvent state. Hawkins v. Howard and Gibbs.

10. A bill of exchange given in payment to a person who becomes bankrupt, is a good payment, though the bill does not become payable till after the bankruptcy, if the party paying it did not know of the insolvency of the bankrupt. Bennett and another, Assignees of Hull, v. Spackman.

11. Interest at 20 per cent. by stat. 49 G. 3, c. 121, in the case of assignees of a bank-rupt wilfully retaining a balance, cannot be recovered in assumpsit on the common money counts. Beresford v. Birch.

12. The assignees of a bankrupt may maintain trover for bills of exchange sent by him to one of his creditors, after committing an act of bankruptcy, though he being a bill-broker had merely lent money on them, and had not either discounted or given the full value for them. Hall, Assignee of Harris, v. Barnard. 382

3. A bankrupt bought and represented himself as a dealer, but there was no distinct proof of his ever having sold—it ought to go to the jury.—But if there be distinct proof that he bought to carry on a system of fraud, by making away with the goods, and not selling them, the Judge will nonsuit the assignees, as it is not a trading. Millikin v. Brandon. 380

14. In trover by the assignees of a bank-rupt, to recover property in his order and disposition at the time of the act of bankruptcy, no demand and refusal are necessary. Sommes v. Watts. 400

necessary. Soames v. Watts. 400
15. An act of bankruptcy is committed by lying in prison for two months, though the party have the benefit of day-rules during that time. 1bid.

16. If assignees of a bankrupt have brought an action, and have attempted to prove one item of their demand, and fail, because they could not prove an act of bankruptcy sufficiently early, they cannot bring another action for that claim which they could not before succeed in. Stafford v. Clark.

17. And the record in the former action is evidence in the second action, without being pleaded, though not conclusive as an estoppel.

18. And the record in the former action is evidence in the second action, without being pleaded, though not conclusive as an estoppel.

18. An admission by a defendant, that he has received 30s. from a bankrupt after act of bankruptcy, will not support the count on an account stated with the assignees. Ibid.

19. If by a private act of Parliament a privilege of the sole making of a newly

invented machine is vested in certain persons, with a proviso that it shall be forfeited in case it shall become " restat in, or in trust for more than five persons, or their representatives, otherwise than by devise or succession," (reckoning executors and administrators only as the single persons they represent:) Held, that if one of the persons become bankrupt the right passes to his assignees; and that though there are more than five creditors, yet the assignees do not hold it in trust for "more than five persons, otherwise than by devise or succession," within the meaning of the act. Blozam v. Elsee.

20. The declarations of a bankrupt to a party with whom he is dealing, respecting his transactions in trade, are not evidence to prove the trading of such bankrupt. Brinley v. King.

BASTARD.

If the father of an illegitimate child consents to pay an annual sum for its support, he will be bound to continue to do so, or to provide for the child himself, or to give the most distinct notice of his intention to pay such annual sum no longer. Cameron v. Baker. 268

BILL OF EXCEPTIONS.

If a bill of exceptions is tendered to a Judge, the facts still go to the jury; but a demurrer to evidence stops the case.

Miller v. Warre.

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BILL OF EXCHANGE.

See EVIDENCE, 15, 16.

1. A bill-broker cannot recover in an action against the acceptor of a bill indorsed generally, if he discounted it under circumstances which ought to have excited suspicion in his mind. Gill v. Cubitts and Others. 163, 487

2. In an action on a bill of exchange, by indorsee against acceptor, the declarations of a former holder of the bill are evidence, if it can be shown that at that time he was holder of the bill, and was making such declarations to his own prejudice, and against his own interest. Pocock v. Billing.
230
But see Barough v. White.
T. T. 1825.

3. Semble, That an averment in a declaration on a bill of exchange, drawn in Ireland, and made payable in England, treating the sum mentioned in the bill as Irish currency, and stating it to be of a certain value in lawful money of Great Britain, is material, and will prevent the plaintiff from recovering more than that sum; though without such an averment,

for English currency. A bill drawn in beland for 256l. 18s. sterling, payable in England, will be taken to mean English money. Tuylor and Another v. Booth. 286

4. Whether, after the indorsee of a dishonored bill has brought actions against the indorser and the acceptor, his taking a cognosit of the acceptor for payment by instalments, is such a giving time as discharges the other parties to the bill-Quere. Lee v. Levi

See, also, Jay v. Warren. i. In a letter intended as a notice of dishonor of a bill, the dishonor ought to be stated as a specific fact; and it is not sufficient for the letter merely to demand the money of the drawer, and leave him 2. If the duties of a sworn broker are exeto infer that the bill has been dishonored. Hartley v. Case.

6. Whether notice of the dishonor of a bill after the bill has been actually dishonored, is good, though given on the very day on which the bill became due-Quare. Ibid.

7. If one is sued on a bill of exchange, and it appears that the plaintiff has agreed with a third person, that if he will advance part of the sum for the defendant, he will take that in discharge of the whole debt, and such third person so advances it, that is a good defence to the action. Welby v. Drake.

- 8. If A. give an accommodation acceptance to B_n , which B, gives to C, as a security for some acceptances of his, and these acceptances, when they become due, are paid by B. out of the produce of other acceptances given by C, but A acceptance is not given up, though C. is desired not to present it, and A. informed that it will not be presented. Held, that the original transaction is continued, and A. not calling for the delivery up of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given. Woodroffe v. Hayne. 600
- 3. A bill accepted, payable at the office of an attorney, is presented at a reasonable time, if presented at eight in the evening, in the month of February. Triggs, Administratrix, v. Newman. 631

BOND.

See ANNUITY, 1.

1. A letter from a surety for a collector to the obligees of his bond, stating that he will not be liable after the date of the letter, is no desence to an action on the if it be not pleaded specially. If it be leaded-Quere. Hough and Another v. Ware

he would be entitled to treat the bill as |2. In assessing damages on a writ of in quiry, on a bond to replace stock, the fair rule is, to take the price of the stock on the day of the trial, or the day previous. Harrison v. Harrison.

BROKER.

1. If a broker makes a contract with the defendant for the purchase of goods, and delivers, by mistake, a bought note to each party, and does not mention his principal's (the buyer's) name, but makes a proper entry of it in his book; held, that the buyer may maintain an action for the breach of this contract. Gale v. WeЦa.

cuted in such a manner that no benefit results from them, he is not entitled to recover either his commission, or even a compensation for his trouble. Hamond v. *Holiday*.

A note sent by a broker to his principal, of a purchase he had made, does not require a stamp. Josephs v. Pebrer.

BUBBLE.

If several persons are jointly engaged in raising money for a bubble, one cannot maintain an action for money had and received against another of them, for the money so raised. MacGregor v. Lowe. 200

BURGLARY.

It is a sufficient breaking to constitute the crime of burglary, if the party breaks a pane of glass of a window, and puts his hand in for the purpose of opening the shutter, though he cannot succeed in doing so. Rex v. Joseph Perkes.

CARRIER.

See Convension, 1.

In action against carriers for loss of a parcel, the consignee's shopman, not knowing of the delivery, and believing that he must have known it if a delivery had taken place, is prima facie evidence of non-delivery. Griffiths v. Lee and Others.

CERTIORARI.

See Indictment, 1.

CHARTER-PARTY.

bond for a deficit subsequent to the letter, If the master of a ship enter into an agreement of charter-party, not under seal, in which the defendant agrees to pay him the freight by good bills; the defendant

is justified in paying them to the owner of the ship, after notice by the master not to do so. Alkinson v. Colesworth.

339, 516

CHURCHWARDENS.

A parish may legally have two divisions, with churchwardens keeping separate accounts for each division. Astle and Another v. Thomas and Another. 103

COACH-PROPRIETOR.

Action is maintainable against him for negligence, though the coach had been examined previous to the second journey before the accident, and repaired only three or four days before. Bremner v. Williams.

COGNOVIT.

A cognovil which merely gives the defendant time, does not require an agreement-stamp. Jay v. Warren. 532

 Semble. Giving the acceptor of a bill three weeks, by taking his cognovit, is not such a giving time as will discharge the other parties to the bill. Ibid.

CONDUCT MONEY.

See Expenses, 1.

CONFESSION.

The confession of a prisoner is evidence, though previous to it an inducement to confess had been held out to the prisoner, by another person, if that person had no authority, as being constable, prosecutor, or the like. R. v. Gibbons. 97

 Confession of a prisoner to a constable, who had held out no inducement, is evidence; though an inducement had been previously held out by a person in no office or authority. Rex v. George Tyler and John Finch.

CONFIDENCE.

See ATTORNEY, 2, 4.—EVIDENCE, 24.

CONSTABLE.

See IMPRISONMENT, 1.

CONSUL.

If a consul is acting between party and party, though he acts as consul, he may receive fees; but if he acts for his government, he is not entitled to any. De Lama v. Haldimand.

CONVERSION.

1. Guardians of a female under age are

justified in stopping her elopement, and in detaining her clothes if she has eloped; and a carrier, by whom she has sent them, is justified in delivering them up to the guardians, that being no conversion. Barker v. Taylor.

 A packer having, in the exercise of his business, shipped the goods, under the orders of a person who employed him for that purpose, is not guilty of a conversion. Greenway and Another v. Fisher and Others.

CONVEYANCER.

A certificated conveyancer can maintain no action for his fees. Jenkins v. Slade. 970

But see the case of Poucher v. Norman, H. T. 1825.

CORONER.

Information against a coroner, for corruption in his office, who was found guilty. The Judge refused to commit the defendant, or to hold him to bail, no disposition to abscond being shown. Rex v. Edmond Whitcomb, Gent., one of the coroners of Shropshire.

CORPORATION. .

A corporation in a foreign country may sue as such in this country, but they must prove that they are incorporated in that country; and it will be left to the jury, to say, whether the body so incorporated is the same which now sues. The National Bank of St. Charles v. De Bernales.

CORRUPT CONTRACT.

If two defendants are indicted for jointly making a corrupt contract with a third person, for procuring an East India cadetship, one of the defendants may be convicted, though the other is acquitted. Rex v. Taggart and Baskcomb. 201

COSTS.

See AGREEMENT, 4.

Semble, That where many useless witnesses are called by the successful party, the judge will cause the prothonotary to be apprised of it, to guide him in his taxation of costs. Clark v. Webster and Salt.

De 2. Between 24 June, 1824, and 6 Nov. 1824, neither 13 G. 3, c. 51, nor 5 G. 4, c. 106, applies, and the plaintiff in a case arising in Wales gets the same costs as if the cause arose entirely in England. Moore v. Williams.

COUNSEL.

See EVIDENCE, 24.

OUNTERMAND.

If a person direct his banker to hold a sum of money at the disposal of a third person, the party so ordering may countermand his order at any time before the banker has paid the money to such third person, or entered into some equivalent arrangement with him, incompatible with a countermand of the order. Gibson v. Minet and Another. 247

CREDIT.

In actions for work and labor, if it appears that the plaintiff has once given credit to A, he cannot afterwards shift his claim, and charge B. Leggat v. Reed. 16

CRIM. CON.

See Evidence, 22.

CROSS-EXAMINATION.

On indictment of a female prisoner for stealing from the person in a house, you cannot ask the prosecutor in cross-examination, "whether at that house any thing improper passed between him and the prisoner." Rex v. Sarah Pitcher. 85

CUSTODY OF DOCUMENTS.

The chest of a company kept by the clerk of the company, is proper custody for old documents relating to the company. But the private house of a deceased clerk of the company, is not proper custody for a convention temp. Ed. 4, between the Prince of Wales and the company. The Morers, 4c., Company of Shrewsbury v. Hart.

CUTTING WITH INTENT TO MURDER.

To constitute the offence of cutting with intent to murder, it is not necessary that the wound should be near a vital part, or of such a nature as to be likely to cause death. Rex v. George Griffith. 298

DAMAGES.

See POST-MASTER, 1.

DEED, PRODUCTION OF.

See PRODUCTION OF DEEDS.

DEFAMATION. See SLANDER.

DELIVERY OF GOODS.

See Frauds, Statute or, 1

DEMISE.

See EVIDENCE, 17.

DEVIATION.

A ship going from London to Granada, and back, having been forty-eight hours in a port in Granada, has concluded her outward voyage. If she goes afterwards to other parts in the same island to deliver her outward cargo, and receive contracts for homeward freight, and so is lost; this is a loss on her homeward voyage.

Miler v. Warre.

237

DISSEISIN.

See FINE, 1.

DISTRESS.

Action on the stat. of Marlbridge, for an excessive distress. Sells v. Hoare, Goodwyn, and Others. 28

DRIVING, NEGLIGENT.

 In an action against a defendant for the injury occasioned by the careless driving of his servant, the plaintiff may recover for the injury done to his wife as well as himself, without bringing a separate action for each. Alison v. Fointer. 21

2. In an action on the case, for the negligent driving of the defendant's servant, if it appear that the defendant holds himself out to the world as the owner of the cart, by suffering his name to remain painted on it, and over the door of the house of business to which it belonged, the action is maintainable, against him, although it is proved that he had for some days ceased to be owner of the cart, and concerned in the business, having resigned both up to his former partner. Stables v. Eley. 614

3. If the declaration, in an action on the case against coach proprietors, for an injury received by the overturning of a coach, state, that it was their duty to carry the plaintiff safely for a certain hire, it does not mean to carry safely at all events, but the declaration will be sufficiently supported, by proof of the want of due care. Hurris v. Costar and Others. 636

4. In an action for an injury done to a stage-coach by a cart, the coachman is not a competent witness for the plaintiff, without a release. Kerrison v. Coatsworth. 645

EJECTMENT.

See Variance, 10-Waiver, 2.

Ejectment cannot be brought against a person for setting up a stall, in a street. The remedy is by action of trespass, by the owner of the soil. Doe, d. The Minister and Parish Officers of St. Julian, Shrewsbury, v. Cowley. 123

ELOPEMENT.

See CONVERSION, 1.

EMBEZZLEMENT.

1. Held, by the twelve Judges, that if a servant receives money on his employers' account, and embezzles it, he is guilty of a felony, though his employers had no right to it, and were wrong-doers in receiving it. Rex v. Beacall, Rex v. Wellings. 454

2. Held, that if under an act of Parliament, the property in goods, chattels, debts, &c., are vested in certain directors of the poor, money and securities

for money are not included.

3. In an indictment for embezzling money, it needs not be stated from whom the money was received. lbid.

4. The servant of a corporation that embezzles their money, is guilty of felony, though not appointed under their common seal. S. C.

ENTRIES IN BOOKS OF A COMPANY, ASSESSMENTS, &c.

See EVIDENCE, 14.

ESTOPPEL.

See BARKBUPT, 18.

EVIDENCE.

- See APOTHECARY, 2.—BANKRUPT, 2, 18, 20. -Carrier, 1.—Confession, 1, 2.—Exe-CUTORS, 1.—FALSE REPRESENTATION, 1.
 —FINE, 3.—FORGERY, 1.—GUARANTER, 1.
 HUSBAND & WIFE, 2, 3, 5.—IDENTITY, 1. -Insolvent, 2.-Kino's Evidence, 1.-LIBBL, 1, 2.—MANSLAUGHTER, 1,—No-TICE, 2.—PRACTICE, 7, 11.—SHIP, 1, 2.-SHIP'S REGISTER, 2.—SLANDER, 1.—STOCK JOBBING.—TENANT.—TERM.—THEATRE. TITHES, 1, 2, 3.—TROVER, 4.—VARIANCE, 2, 3.—VETERINARY COLLEGE.
- 1. Semble, That a witness is competent to 11. A letter written by the indorser of a bill prove that a debt due jointly to him and the plaintiff is paid. Evens v. Yeathard.
- 49, 336 2. An admission by a party, that he is in 12. In an action of covenant the attorney possession of certain premises, is no evidence of his possession on any day antecedent to that on which the admission is made. Tindal v. Whitrow.

2. If an alteration has been made in the

plaintiff's pass-book with his bankers by some person at his bankers', if he inquires there why it is done, the answer he receives from a person acting in the Banking-house as a clerk, is evidence in an action against the bankers. Price v. Marsh and Others.

4. If in conversation the opposite party states the contents of a written paper, you may give such his declaration in evidence without producing the paper.

If a witness has given a note jointly with others for a sum of money to indemnify the defendant in the action, and his name has been erased from the note by consent of all parties to it, his competency is restored, and he may be examined for the defendant. Sewall & Brett, Assignees of S. & J. Wright, v. Stubbs & Hancock.

Trover for bricks. Evidence that men fetched them away, saying they were ordered by the defendant; and evidence that the cart they took them in, had on it the same name as the defendant's, is not evidence to go to the jury that the defendant took them away. Everest v. Wood.

6. Semble, That a letter written by a bankrupt, shortly after absenting himself from home, is evidence to show his motive in going, but not to prove the fact of his absence. Rawson and Others, Assignees of Wilkinson, v. Haigh, Executor of Haigh.

7. On indictment for a conspiracy, the letters of one of the defendants to the other are, under certain circumstances, admissible in evidence in his favor, to show that he was the dupe of the other, and not himself a participator in any fraud. Rex ▼. Whitehead.

8. Corroboration of accomplice's evidence needs not be on every material point Rex v. Barnard and Others.

9. A plaintiff is not at liberty to give secondary evidence of the contents of a document, if his witnesses trace it to a person not connected with the cause, without calling that person. Freeman v. Arkell.

10. A plaintiff may give secondary evidence of the contents of a written paper, if those in whose possession it was, proved that they had made diligent search for it, and could not find it. Har-139 per v. Cook.

282 And see Parkins v. Cobbet. is evidence for the defendant in an action by indorsee against acceptor. Coder v.

Symons, otherwise Sherwood. of a third person, who holds the deed as such, is not bound to produce it; but the plaintiff may go into secondary evidence.

An attested copy on 1s. stamp, is sal-

missible as secondary evidence. Ditcher | 21. A witness to prove the execution of a v. Kenrick.

13. To make a defendant's card evidence, you must give him notice to produce his cards, and put in one as a copy, unless the one to be put in can be proved to have been given to the witness by the defendant himself. Clark v. Capp. 199

14. On an ejectment for a house, the landtax assessment of the parish, in which the collector of taxes charges himself with the receipt of money from A. B. as tenant of a particular house, is evidence 22. On an inquiry in an action for crim. that A. B. was tenant at that time.

The books of an insurance company, m which they charge themselves with the receipt of a sum of money, as a premium to insure a particular house in the occupation of A. B. from fire, are also evidence of his occupation.

These entries are evidence because the party making them charges himself with the receipt of money. Doe, dem. Smith, v. Carturight.

15. In an action by the indorsee of a bill, against the acceptor, the declaration of the drawer is admissible in evidence, to show that the bill was obtained by fraud. The plaintiff must be, however, shown to be in some way privy to the fraud. Peckhom v. Potter.

But see Barough v. White. T. T. 1825. 16. In an action on a bill of exchange, by indorsee, against acceptor, the declarations of a former holder of the bill, are evidence, if it can be shown that at that time he was holder of the bill, and was making such declarations to his own prejudice, and against his own interest.

Poccele v. Billing. 230

47. If the issue is, whether the plaintiff is tenant of the defendant under a demise " for one year from the 23d of April, 1821, and thence afterwards from year to year," evidence that the plaintiff has paid the defendant rent, is not sufficient proof of the demise in issue. Phillips v. Mosely and Others.

18 A paper written by a party is admissible in evidence against that party, though

it is signed by a third person.

If a person goes and offers a sum of money, stating how much he offers, and holding the money twisted up in bank notes, in his hand, it is a sufficient tender; but if the sum had not been mentioned, semble, that it would not have been a good tender. Alexander v. Brown.

19. Medical persons are bound to reveal confidential communications, when called upon in courts of justice. Rex v.

20. The confession of a prisoner is evidence, though previous to it an inducement to confess had been held out by another person, if that person had no authority. S. C. Vol. XII.—50

bond did not recollect whether at the time it was executed it had any seal; and he swore that he did not read the attestation, when he witnessed the execution: but there being a seal at the time of the trial, and the bond itself saying "sealed with our seals," it was held to be sufficient proof; but this evidence would not have been sufficient, if there had been no seal on the bond at the time of the trial. Ball v. Taylor.

con. into the circumstances of the defendant, the executor of a deceased relation is bound to answer a question which requires him to state the amount of property the defendant acquired under the will of his testator. Peter v. Huncock. 375

23. If the defendant's counsel cross-exa mines as to certain misrepresentations made towards the defendant, and deceptions practised on him, this is to be considered as notice to the plaintiff's counsel of the line of defence; and therefore, if he has letters of the defendant tending to show that he knew the real state of the facts, the plaintiff's counsel ought to give them in evidence, before the plaintiff's case is closed, and he will not be allowed to put them in evidence in reply. Wharton v. Lewis.

24. A party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk, or otherwise, as the retaining of counsel falls within the rules respecting confidential Foote v. Hayne. 545 communications.

25. If in an action for breach of promise of marriage, the defence set up is, that the defendant was induced to make the promise through misrepresentations made to him; and it is proved that the plaintiff knew that her father wrote letters to the defendant, in which he made statements respecting her; such letters are evidence for the defendant, though there is no proof that the plaintiff had read them, or was acquainted with their exact contents, but the plaintiff would not be considered answerable for the particular expressions contained in them. But a verbal representation made by the plaintiff's father (she not being present) to a third person, who communicated it to the defendant, is not evidence. Foote v. Hayne.

26. You cannot ask a witness what the opposite party has said as to the contents of deeds executed by him, without such party has had notice to produce such deeds. Blocam v. Elsee.

27. If the declaration in an action to recover the price of goods, sent for sale, on commission, allege that the defendant sold but did not account to the plaintiff, the plaintiff must prove that a sale ac-

tually took place, and it will not be presumed, even at a distance of twelve months after the delivery of the goods. Elbourn v. Upjohn.

28. Office copies of Chancery proceedings are not evidence on the trial of an issue out of the Court of Chancery, although they may have been read in evidence in that court. Burnand v. Nerot.

29. If there are parol negotiations which are afterwards reduced into writing, the writing must be looked to as showing the final arrangement; but when a question arises as to whether a transaction has a usurious character, questions may be put to ascertain whether other matters, which do not appear on the face of it, were not previously talked of. Sinclair v. Stevenson.

30. If a paper be traced to the hands of an agent of a party in a suit, and notice has been given to the party to produce it, he is bound to do so; and the opposite party are not bound to call the agent as a witness; and if the party has delivered it to the stamp office, to get certain duties allowed, and does not tell the party serving the notice to produce, of that circumstance, parol evidence of the contents may be given.

31. If an agreement purport by the words attached to the signature of a particular person, to have been signed by that person, on the behalf of another, having an interest but not being a party, such person may be examined to prove that he signed in reality for a different person, who was named as a party, and whose signature was not to the agreement, and that the statement of his having signed for the first-mentioned person, was written by mistake. Rumball v. Wright. 589

32. A plaintiff may use as his evidence answers given to interrogatories exhibited by the defendant in the cause, but if he does so he cannot object that some of them are not evidence, on account of their appearing to state the contents of written papers. Milntyre v. Layard. 606

33. A horse was sold under a written warranty, contained in a receipt for the purchase money, which was given to the buyer's servant; the son of the seller 1. A witness, who is subpænaed by a de-(who was proved to have been present when the bargain was made, and to have acted at other times in his father's business, but never to have sold a horse by himself) got the receipt back from the servant by a fraudulent representation: Held, in an action on the warranty against the father, that, under such circumstances, parol evidence of the contents could not be given, but that the son must be called as a witness. The son being called, proved that he went for 3. In frivolous cases of felony, the judge the receipt by desire of a person named T., the owner of the horse, for whom his father sold on commission, and did not

mention the subject to his father till be had obtained it:-his father then had possession of the receipt for a very short time, after which it was sent to T. Held. that this fact did not vary the case, so as to let in the parol testimony. Best v. Osborn.

34. Evidence may be given by parol of material facts which transpired at an examination before commissioners of bankrupt, but which were not taken down in writing. Rowland v. Ashby and Another.

EXECUTION.

If a party has goods on hire for a term, and the sheriff seizes them under an execution against such party, the owner of the goods may maintain an action on the case against the sheriff, if the sheriff sells the entire property of such goods: but, to support the action, he must show, that, as soon as the goods were seized, he apprised the sheriff that the goods were lent for a term only; in order that the sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods. Whittaker and Another, Sheriffs of Middle-

EXECUTORS.

1. In answer to a plea of plene administravil, proof that the deceased's property was sworn under a certain sum, is prime facie evidence of assets to the amount of the smallest sum that would pay the same probate duty as the sum sworn to Curtis v. Hunt and Others.

If two persons, who are executors jointly with a third, bring an action in their own persons, and not as executors, on a contract made with those two, the third having taken no part in the making of the contract: such action can be maintained by those two, without the third joining. Brassington and Another v. Ault. 302

EXPENSES.

fendant indicted for a conspiracy, is compellable to give evidence, though such defendant refuses to pay his expenses; and the indictment having been removed by certiorari, and coming down to the assizes as a civil record, does not make any difference as to this. Rex v. Cooke & Jenkinson.

2. Expenses of witness going to identify stolen property, disallowed. Rex v. Millington.

will not allow the prosecutor's expenses, though he was bound over by a magistrate. Rex v. Powell.

FALSE REPRESENTATION.

Declaration in tort, stating that the defendant, on the sale of Teneriffe Burilla, asserted that 7½ cwt. would produce a ton of soap, well knowing it would not do so, is not supported by evidence that he said he had made 7 tons of soap out of 51 cwt. and no proof of the scienter. Horncastle and Another v. Moat.

FALSE PRETENCES.

If one professes to sell an interest in property, and receives the purchase-money, the vendee taking the usual covenant for title, and it turn out that the vendor has in fact previously sold his interest in the property to a third person. This is not sufficient to support an indictment If a horse is sold with a warranty, any for obtaining money by false pretences. Rez v. Codrington.

FINE.

1. A fine with proclamations by a disseisor, bars ejectments, unless there has been an actual entry to avoid its operation. Doe, dem. Anderson, v. Turner. 91

2 A second son, who was living with his father at the time of his death, holding ossession of his father's house, levies a fine with proclamations: the eldest son need not make an actual entry to avoid this fine. Doe, dem. Davis, v. Davis. 130

3. If in a fine there be a patent ambiguity, 2. That part of the Statute of Frauds, the fine is void; but if there is a latent ambiguity, it may be explained by evi-

If a fine be levied of twelve houses, it revokes a previous will quoud those houses; but evidence may be given to show that the conusor had nineteen houses, and that a particular twelve were meant by the fine. Doe, dem. Bulkeley, v. Wilford.

FORFEITURE.

See LEASE, 1.

FORGERY.

1. A person whose name is forged, is a competent witness to prove the forgery, if released. Rex v. Thomas Pigeon. 98 2. If a banker of a supposed acceptor of a forged bill discount it for the agent of one of the indorsers, on the discovery of the forgery, the banker so discounting may recover back the money he paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his

hand-writing.

Smith and Another.

Fuller and Others v.

197

On an indictment for forging the name, of two joint acceptors, one release by the holder, for valuable consideration, to both of them jointly, is sufficient to make them competent witnesses to prove the forgery; and such release requires but one stamp. Rex v. Bayley. 4. A release to one of two joint acceptors,

inures to discharge both. 166 5. A power of attorney under seal, to transfer stock in the public funds, is a deed; and knowingly uttering a forged one is a

capital offence, under stat. 2 Geo. 2, c. 25, s. 1. Rex v. Fauntleroy

FRAUD.

See LIEN.

fraud at the time of the sale will avoid the sale, though it is not on any point included in the warranty. Steward v Coesvelt.

FRAUDS, STATUTE OF.

 The plaintiff agreed by parol, that, if the defendant would employ his ship to carry corn, he would bring him coals at a stipulated price. This contract is not within the Statute of Frauds, and need not be in writing; nor is part delivery, or part payment, necessary to make it binding. Cobbold v. Caston. which directs certain agreements to be in writing, will be taken notice of by the Court on the trial of an issue out of the Court of Chancery. However, if the jury should think that there was an agreement made which was not in writing, the Judge will indorse that finding on the postea as special matter. Burnand and Another v. Nerot.

GAME.

1. On an information filed in the Crown Office for game penalties, notice to a defendant in custody, indorsed on a copy of the information, to appear and plead, or demur; or a plea and appearance will be entered under the stat. 48 Geo. 3, c. 58, is not good; as that stat does not apply to informations of this sort.

On such an information, if a verdicpasses in favor of one defendant, and against another, the acquitted defendant

is not entitled to his costs-

Whether, on the trial of such information, it is necessary that a defendant in custody, who has not employed either attorney or counsel, should be brought into court at the time of the trial—And if it is necessary that he should, whether

he should be brought up by an order of the Judge at Nisi Prius, or by habeas corpus. Quære. Davies v. Bint, Cooke, 439, 659 2. If larceny be jointly committed by husand Others.

GOODS NOT ACCORDING TO ORDER.

If goods are supplied not according to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them. Milner et al. v. Tucker.

GUARDIAN.

See Convension, 1.

GUARANTEE.

- 1. In an action on a guarantee undertaking to make provision for the repayment of a sum lent to a third person, the plaintiff must give some proof that no provision has been made by the defendant, or he will be nonsuited. Slight proof, however, is sufficient. Garrett v. Handley.
- 217, 483 2. Whether an undertaking to pay for work to be done, if the plaintiff will advance money, is a guarantee-Quare. Parkins v. Moravia. 376, 507

HIGHWAY.

1. In an indictment for obstructing a common highway, the highway may be laid as a common highway for carts, carriages, &c., though it has always been arched over; provided it is capable of being used by all ordinary carriages; and notwithstanding the arch-way be not sufficiently high to permit road wagons and other carriages of unusual dimensions to pass under it. Rex v. Lynn & 527 Debney.

HOUSEBREAKING.

1. To constitute the offence of breaking into a dwelling-house in the day-time, (no person being therein,) it must be proved, that the breaking took place at a time of day, when there was sufficient day-light to distinguish a person's features. Rex v. Caleb Tandy. 297

HUSBAND AND WIFE See DRIVING, NEGLIGENT, 1.

1. Agreements by husband and wife to live 2. Semble, that a jailor, bringing a prisoner separate, are legal. If you intend to set up adultery to avoid such agreement, you ought to plead it. If the parties live together after the agreement, that will put an end to it. The wife's conduct towards her husband on coming back is

evidence on action by her trustee for the separate maintenance. Scholey v. Good-

band and wife, the wife is entitled to be acquitted as under coercion: the woman being indicted as "the wife of A. B." is sufficient proof that she is so for this puroose. Rex v. Knight and his Wife. 116 3. Husband and wife trading as partners in Spain, cannot sue in our courts without proof, that, by the law of Spain, a feme covert is allowed to trade. Whether on such proof an action could be maintained by both-Quere. Cosio and Pineyro v. De Bernales.

4. The jury may judge whether goods furnished to a wife are suitable to her husband's rank. Montague v. Espinasse.

356, 502 5. A husband is not liable for goods supplied to his wife while she is living with him, without proof of his assent to the order. If she is wrongfully put away, he is liable for her necessaries, if he neglects to find them for her.

6. In assumpsit for board and lodging supplied to the defendant's wife, if the defence is the adultery of the wife, a statement made by her, confessing her adultery, which statement was made immediately previous to her husband turning her out of doors, is admissible in evi-dence on the part of the husband; and so are letters from different men, found by him at that time in her writing-desk. Walton v. Green.

IDENTITY.

A person sends letters to S. F. of Plymouth Dock, and receives answers to them; such answers are admissible in evidence against a defendant, his name being S. F., and it being proved by a person who knew the principal residents of Plymouth Dock, and knew of no other person named S. F.; this being considered sufficient prima facie evidence that they came from him; and if they were not of his hand-writing, it lay on him to show that. Harrington v. Fry. 289

IMPRISONMENT.

1. If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow. Levy v. Edwards. out of his county to be present at the trial

of an information on the game laws, in which he is defendant, without having a habeas corpus, or judge's order, for that purpose, is liable to an action for faisc imprisonment. Bint v. Lavender.

INDICTMENT.

See Endiselement.—Practice, 9, 10.

i. The names of the grand jurors, who found an indictment removed by certisrari, need not be inserted in the caption. Rez v. Davis.

2. If two persons are jointly indicted for obstructing a highway, and no joint act appears, the judge, as soon as the case for the prosecution is closed, will put the prosecutor's counsel to elect which he will proceed against, and take an acquistal for the other. Rex v. Lynn and Debney.

INFANCY.

1. A father is not liable to pay for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied. Black-burn v. Mackey, 1. Pluck v. Tollemache, 8. P.

2 An infant is suable for so much of goods supplied to him to trade with as were used as necessaries in his own family. Turberville v. Whitehouse.

INSOLVENT.

1. An insolvent cannot maintain trover for plate, though his assignee does not inter-

fere to prevent him. Lea v. Telfer. 146 In an action by the assignees of an insolvent debtor to recover money from one of the creditors, which ought to have gone to the general fund, the insolvent is not a competent witness on the part of the plaintiff. Rudge and Another v. Perguson. 253

INSURANCE.

1. Policy of insurance on ship or ships, warranted to sail from Demerara on or before the first of August. The ship (a small one) sailed on that day two and a half miles, and then anchored at a place nearer the town than large ships can come. This is a "sailing from Demerara" within the policy. Lang v. Ander-171, 480

2. If a ship is so injured by perils of the seas, that she is rendered wholly unfit for sea, and cannot be repaired but at a greater expense than building a new ship, the owner may recover for a total loss, though the ship, in the state she is reduced to, is sold with her registry. Cambridge v. Anderdon.

3. A ship going from London to Granada and back, having been forty-eight hours in a port in Granada, has concluded her outward voyage. If she goes afterwards 2. Aldermen by charter empowered to apto other parts in the same island to deliver outward cargo, and receive contracts for homeward freight, and so is

lost, this is a loss on her homeward

voyage.

A ship-owner, who has entered into contracts for freight, has an insurable interest in the freight, though the contracts are not in writing. Miller v. Warre.

. A creditor insures the life of his debtor, who makes false representations of his health, without the creditor's knowledge of the falsity. The policy is vitiated, though the insured died of a disease he was not then afflicted with. Maynard v. Rhode, Esq.

ISSUE OUT OF CHANCERY.

See Frauds, Statute of, 2.—Evidence, 28.

JOINT FUND.

If money be paid by two persons for the benefit of a third, whether they ought to bring a joint action for the whole sum, and whether each has a separate action for the sum he has advanced. Quere. May and Others v. May and Others. 44, 336

JOINT STOCK COMPANIES.

1. An agreement, relative to the buying of shares in a proposed joint stock com-pany, unauthorized by statute or charter, is illegal, and cannot be enforced. Josephs v. Pebrer.

2. The broker who bought the shares cannot recover his money of his principal.

Ibid.

JUDGMENT.

As long as a judgment exists, it protects those who seize property under an execution founded on it; and, if the judgment and execution are set aside, no action lies against the sheriff for any thing he did under it, while it remained in existence. Ives v. Lucas & Thompson. 7

JURORS, GRAND.

See Indictment, 1.

JURY, SPECIAL.

See PRACTICE, 12.

JUSTICE OF THE PEACE.

1. He is entitled to notice, if he acted under a belief only of jurisdiction. Jones v. Williams.

point deputies. Though they be justices themselves, qua aldermen, such deputies are not justices. And therefore these 98 INDEX.

deputies are not entitled to notice. Whether the stat. 4 Geo. 4, c. 34, gives justices authority over menial servants, as such servants—Quære. If a person claims a right to act as justice, he is entitled to notice, though the grounds on which the plaintiff goes is a denial of such right. Jones v. Williams.

459, 669

KING'S EVIDENCE.

Method of moving to admit king's evidence. Rex v. Barnard, Farmer, & Bedford.

87, in the note.

LANDLORD OF LODGINGS.

If the landlord of lodgings enter into or use the lodgings while his tenant is in possession of them, it deprives the landlord of his right to rent: but if the tenant has during the tenancy abandoned the possession, and the landlord lights fires in the rooms, and even makes some use of such fires, he will not by this lose his right to rent. Griffith v. Hodges. 419

LARCENY.

If a person stealing other property, take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony. Rex v. Crump. 658

LEASE.

- If a lessor, after a forfeiture, advises a
 person to purchase the term of his lessee, he cannot maintain an ejectment for
 such forfeiture against that purchaser;
 but otherwise, if the party have an interest, e. g. an annuity secured on the premises, and the advice is, to "take to
 them" merely. Doe, dem. Sore, v. Eykins.
- 2. The depositing a lease in the hands of brewers for money lent, is not within the meaning of a proviso for re-entry, which is to take effect if the lessee, his executors, &c., should "grant any underlease, or assign, transfer, set over, or otherwise part with the lease or premises without license." Doe, dem. Pitt, v. Hogg. 160

LIBEL.

 If a libel is justified as true, and in the plea each specific statement is averred to be true; if the defendant does not prove each statement to be true, the plea is not proved, though he prove facts of the same kind. Weaver v. Lloyd. 295

the same kind. Weaver v. Lloyd. 295
2. In an action for a libel, if a letter of the defendant is read, which refers to an account of the transaction the libel relates

to, which has appeared that newspaper may be dence. Idem.

LICENSE, LEAVE AND

1. Leave and license to b a common given by a parol. He can bring n encroachment, though n mon is left. Harvey v.

2. In trespass quare classeveral days; plea, leaver the whole: if some or were committed after the voked, the plaintiff need If the plaintiff is tenan agreed that A. shall give license to sport over the defendant has such a such license will not supleave and license by the ward v. Grant.

LIEN.

A stable-keeper may, by spacquire a lien on horse and if the owner, to defe them away by fraud, thas a right to get poss and for so doing he will able in trover; for the lend to by the parting will under such circumstal Woodgate.

LIMITATIONS, STA

If a party, when he is shall go to my attorne debt, and settle it," thi take the case out of the tions. Triggs, Adminis ham.

MALICIOUS PROS

In action for malicious plaintiff may call one of to prove that the defend tor on the indictment. kell.

MANSLAUGH

1. An indictment for man ing that the prisoner die A. B. and C. D., who we certain windlass, to lea lass; and by such com &c., the deceased was keen ported by evidence that working the windlass were D., and that by his goin not strong enough to we let it go; because the

and force" must be taken to mean active force. Rex v. Lloyd.

2. A person set to watch a yard or garden, is not justified in shooting one who comes into it in the night, even if he the party, he has fair ground for believing his own life in actual and immediate Rex v. Scully.

3. If a person is driving a cart at an unusually rapid pace, and drives over another and kills him; he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so, if he had not been drunk, Rex v. Walker. 320

4 If two persons quarrel and fight-one runs away, and, when the other overtakes him, he pulls out his knife and stabs him—if death ensues, it is manslanghter; if he had drawn his knife before the conflict began, it would have been murder. Rex v. Kessal.

MARRIAGE.

A marriage in Ireland by a clergyman of the Established Church, is good, though it takes place in a private room, without any special license. Smith v. Maxwell.

MARRIAGE, BREACH OF PROMISE OF.

See EVIDENCE, 23, 24, 25.

l Proof of loose character of the woman goes in bar of the action for breach of promise of marriage, except the man was aware of it at the time of the promise. In mitigation of damages, the man may go into evidence that his relatives disliked the match; and if his father is an incompetent witness, because he employed the attorney to conduct the defence, a witness will be allowed to prove that he heard the father express to the defendant his dislike. Irving v. Green-

2. In an action for breach of promise of marriage, if it appears that the defendant was induced to make the promise, or to continue the connection, either by misrepresentation, or wilful suppression of the real state of the circumstances of the family, and previous life of the plaintiff, this goes in bar of the action, and not to the damages only. Wharton v. Lewis. 529

MISDEMEANOR.

See Expenses, 1.

MONEY HAD AND RECEIVED.

1. If a contract is broken, an action for

money had and received will not lie for money paid under it; an action for breach of contract is the proper remedy: but if the contract has been rescinded, it is otherwise. Davis v. Street. should see the party go into his master's 2. In an action for money paid, laid out, hen-roost. But if, from the conduct of and expended, the plaintiff must prove some authority from the defendant to pay the money. Tappin v. Broster. 112 danger, he is justified in shooting him. 3. If several persons are jointly engaged in raising money for a bubble, one cannot maintain an action for money had and received against another of them, for the money so raised. MacGregor v. Lowe.

MURDER.

See MANSLAUGHTER, 4.

NEGLIGENCE OF COACH PROPRIE-

See COACE PROPRIETORS.

NEGLIGENCE OF SERVANTS.

See TROVER, 2.

NEW ASSIGNMENT. See Assault, 2, 3.

NOTICE.

See BILL OF EXCHANGE, 5.- SURETY.

1. If a defendant is served with a notice to produce letters four days before the trial, this is sufficient, though it is objected that he is a foreigner, and has only been in England since the time when the letters were received by him; and therefore he might have left them abroad. Drabble v. Donner.

To make a defendant's card evidence. you must give him notice to produce his cards and put in one as a copy; unless the one to be put in can be proved to have been given to the witness by the defendant himself. Clark v. Capp. 199 Notice to the principal is, in law, notice to all his agents; therefore, if stage-coach proprietors have given the usual 5L notice to the principal in London, though a parcel sent by their traveller, who did not know of the notice, containing money, was lost, the coach proprietors are not responsible. Mayhew v. Eames. 550

ORDER

If goods are supplied not conformably to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them. Milner et al. v. Tucker.

OWNERSHIP, REPUTED.

1. If a man has goods in his possession as the servant of his father, for the purpose of carrying on a trade for the father's benefit only, they will not pass to the son's assignees under the stat. of 21 Juc. 1. c. 19. Stafford et al., assignees of Clark, junr., v. Clark, senr. 24

2. If the trading, &c., of a bankrupt is proved by the proceedings under the commission, the counsel for the opposite party have no right to look at any of the proceedings but such as have been used for that purpose. Idem. 26

3. If a person sends his servant to sell his not pass to the assignees of the owner of the wharf as goods in his order and disposition, under the stat. 21 Jac. 1, c. 19. Boddy v. Esdaile and Others, assignees of Trigge.

PARTNER, OSTENSIBLE.

An ostensible partner, proved not to be really a partner, needs not join in actions on contracts with the supposed firm. Davenport v. Rackstrow.

PARTNER, RETIRING.

Whether the funds of a former partner in a firm are liable to a person knowingly leaving his balance in the hands of the altered firm; and having declared his confidence in the new firm, &c., Quere. 368 David v. Ellis.

PATENT.

See BANKBUPT, 19.

1. If a patent be taken out by a British subject to hold for an alien enemy at the time; whether that will annul the patent without suing out a sci. fu., Quære Bloxam v. Elsee.

2. A specification by words and drawings Ibid. annexed is good.

PAUPERIS, FORMA.

If one is admitted to defend a suit in Chancery in forma pauperis, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit. Philipe v. Baker.

PAYMASTER.

The plaintiff being the representative of a deceased officer of artillery, of which corps the defendants were paymasters, they delivered to him an account current in which they acknowledged themselves to have received from the year 1806, to the year 1820, pay according to

an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806. Held, that they could not, in 1821, be permitted to say that this admission was by mistake; as, in 1816, the Board of Ordnance had announced that by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it; this announcement of the board having never been communicated to the deceased by the defendants, till the year 1821. Skyring v. Greenwood.

PAYMENT.

deals at another's wharf, these deals do If money is paid by two persons for the benefit of a third, whether they ought to bring a joint action for the whole sum, and whether each has a separate action for the sum he has advanced-Quere. May and Others v. May and Others. 44,336

PENALTY.

The penalty of twenty pounds per chaldron for every chaldron of coals of one sort, sold as and for another sort, inflicted by the statute 47 Geo. 3, sess. 2, c. 68, is a penalty exceeding 201, and therefore recoverable in the superior Courts, under s. 150 of that statute. Reeve, who sues, 622 &c., v. Pool.

PERJURY.

1. An indictment for perjury may be supported against a marksman, for swearing falsely in an affidavit, though it would not be receivable in the court it was sworn in, because the jural did not state that it had been read over to the person swearing to it: but the person administering the oath, must prove that the person swearing it, in fact understood its contents.

The perjury is complete at the time of the swearing of the affidavit; and whether it is receivable in the court or not is immaterial, if the reason why it is not receivable is that some formal regulation is not complied with. 258 Hailey.

2. You cannot convict for perjury on an affidavit, if it refers to a former affidavit, which you are not in condition to prove ldem.

533 3. On an indictment for perjury, the proving the handwriting of the signature of the person who administered the oath is sufficient proof that it was sworn; and if the place at which it was sworn is mentioned in the jural, that is sufficient evidence that it was sworn at that place. Rex v. Spencer.

4. If an insolvent debtor has sworn that his schedule contains a full, true, and perfect account of all debts owing to him

at the time of his petitioning for discharge, an assignment of perjury on and in fact, the said schedule did not contain a full, true, and perfect account, &c., (in the words of the oath) is too general. It ought to state what debt he is charged with omitting. Rex v. Hepper.

PLEADING.

See BILL OF EXCHANGE, 3.—DRIVING, NE-CLICENT, 3 .- EMBEZZEMENT, 3 .- HUS-BAND AND WIFE, 2.—SALE OF RETURN.-SUBSTY .- VARIANCE, 1.

1. If defendants justify shooting a dog by pleading that he attacked them, and that kind, the plaintiff may call witnesses to prove the general quietness of the dog. Clark v. Webster & Salt.

In an action by a passenger in a coach, against the owner for an injury done him by the coach overturning; if the declaration states that the servants of the defendant negligently " drove, conducted, and managed, the Coach." The plaintiff cannot recover, if the negligence was in sending out an insufficient coach. Mayor v. Humphries.

3. In a declaration for usury, the day from which the forbearance is to commence is material, and must be truly stated. If no day is stated, it will be bad. If a wrong 7. day is laid, it will be a fatal variance. Partridge v. Coates. 534

POOR.

1. A deputy overseer, or even a mere stranger directing a surgeon to attend a poor man, is liable to pay the surgeon. Watling v. Walters. 132

2. Whether an overseer is liable to pay a surgeon who attends a pauper without a retainer-Quere. A deputy overseer is not S. C. Ibid.

POSTMASTER.

If a postmaster has agreed to deliver letters in a particular mode, and by mistake does not deliver one for two days, that letter containing a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonor in time, if he sent a special messenger, though too late to do so by the post. Hordern and Another v. Dalton

PRACTICE.

See Tales, 1, 2.

Rule to show cause (granted) for a new Vol. XII.—51 212

trial, because the case came on by surprise. Lee v. Joseph. that oath, stating, that whereas, in truth 2. If a cause has been made a special jury cause, but the special jury have not been summoned, the Lord Chief Justice will take it at the end of the day on which it would have been tried by the special jury, and not let it remain till all the spe-

cial juries in the list are gone through. Archer v. Bamford.

3. In debt on bond, the only plea being solvit ad diem, the execution of the bond is admitted, and the defendant begins. Sandford v. Hunt.

4. In civil causes the judge will allow the plaintiff to recall a witness after he has closed his case, to prove a point omitted to be proved in the proper place. Brown, Esq., v. Giles. 118

he was accustomed to attack and bite man- 5. On the trial of quo warranto informations, if the affirmative of the issues is on the defendant, he begins; but if it is on the relator, he begins. Rex v. Yeates.

> 6. If two defendants are indicted for a conspiracy, the judge will, under certain circumstances, permit one of the defendants, who conducts his own case, to cross-examine before the counsel for the other defendant; and, after the conclusion of the prosecutor's case, to address the jury, and call his witnesses, before the counsel for the other defendant opens his case. Rex v. Cooke and Jenkinson.

If affirmative pleas are pleaded with the general issue, the plaintiff may give in evidence any matter that goes to destroy the justifications pleaded, by way of anticipation of the defence; or he may prove his facts, and trust to answering the defendant's justification by evidence in reply; but if he does this, he will be restricted to such evidence as goes exactly to answer the case attempted to be made out by defendant in support of his pleas. Pierpoint v. Shapland.

When a copy of an agreement sued upon is delivered to the defendant in pursuance of a judge's order for that purpose; the judge will, in general, make it a part of that order that the defendant shall make no objection to the stamp. Price v. Boultby.

 Indictment stating issue joined at the "General Sessions, &c., Glamorgan, be-fore, &c." of the court of Great Sessions, is not proved by showing issue joined at the "Great Sessions." Rex v. Thomas.

10. If in ejectment it is laid that "John Doe. dem. W. R. and D. T., was plaintiff;" and it appears that John Doe was plaintiff on the joint demise, and also in two several demises, it is a fatal variance; as this is a description of how he was plaintiff, and not an allegation only.

11. The judge at the trial of a case cannot |2. Whether a plaintiff can recover on in order any paper to be impounded which is not given in evidence. It is not enough that it should be in court in the possession of one of the witnesses. Rex

v. Clifford.

12, If a case be not gone into, the judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for large penalties, and persons of rank are called on their supanas. Orme v. Crockford, 537 13. On the trial of an indictment for per-

jury, the judge will allow the defendant to address the jury and cross-examine the witnesses, and his counsel to argue points of law and suggest questions to him for the cross-examination of the wit-

nesses. Rex v. Parkins.

14. If, after a witness for defendant has been examined as to a conversation which he put down in writing, and has not been asked to produce the memorandum, and the plaintiff's counsel in reply has observed upon its absence; the judge, for his own satisfaction, asks the witness for the paper, and it is produced; such production will not entitle the plaintiff's connsel to address the jury again upon it. Dowling v. Finigan.

15. The notice of a defendant's intention to try a traverse, is not a condition precedent to its being tried; and the prosecutor, if he appears, aids all defects in it; and he is not allowed to appear for the purpose of objecting to the notice.

Rex v. Hobby.

16. If the court has set aside the judgment against the casual ejector, on the present defendant's undertaking to enter in the consent rule, plead, and take short notice of trial for the adjourned sittings. 2 It is equally a robbery to extort money The adjournment day being Monday, April 11th, and the defendant having pleaded on Saturday, the Lord Chief Justice, on application being made on the 11th, allowed the cause to be entered. Doc. d. of Crawshaw v. Shepherd.

PRINCIPAL AND AGENT.

See AGENT.

PRODUCTION OF DEEDS.

If A. has lent money on a deed of assign ment, which is deposited in his hands, he is not compellable to produce it on the part of the assignor, in an action between the assignor and a third person. Schlenker v. Moxey and Another.

PROMISSORY NOTE.

1. What notes are negotiable or transferable within the statute of 17 Geo. 3, c. 30-Quære. Quarterman et al. v. Green et al.

instrument in the terms "Received of Mr. D. B. 100%, which I promise to pay on demand, with lawful interest, J. D."on an agreement-stamp, and a third re-ceipt-stamp—Quære. Whether one admission of liability to pay a debt can be applied to two distinct causes of action between the same parties-Quare. Green v. Davis.

> PROBANDI, ONUS. See APOTHECARY, 3.

PROMOTIONS-145, 338.

PROSECUTION. See Expenses, 2, 3.

QUO WARRANTO. See PRACTICE, 5.

RELEASE.

See FORGERY, 3, 4.-WITNESS, 10, 18.

RENT.

See LANDLORD.

ROBBERY.

1. To constitute the crime of highway-robbery, the force used must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to getpossession of the property, it is not high-way-robbery. Rex v. Gnord. 304

from a person by threatening to accuse him of an unnatural offence, whether he has been guilty of it or not. Rex v.

479

Gardner.

SALE, OR RETURN.

If goods are supplied on sale or return within a year; after the year is expired if the goods have not been returned, the seller may recover the price on a common count for goods sold and delivered, without any special count. Harrison v 235

> SEDUCTION. See WITNESS, 4.

SERJEANT'S INN.

Rateability of Serjeant's Inn, Chancery Lane. Lens, Esq. v. Browne and Another. 224

SERVANT.

92 1. A servant's invention belongs not to his

master but to himself. Blocam v. Elsee.

2. If a master employs a skilful person for the express purpose of invention, sometimes it is otherwise. Blocam v. Elsee.

SET-OFF.

 A defendant cannot reduce a plaintiff's demand for goods sold, by producing a debtor and creditor account in the handwriting of the plaintiff's clerk, unless he has pleaded or given notice of set-off. Folhergill and Others v. Jones.

2. In an action for use and occupation of stables, the plaintiff and defendant having formerly been connected in a stagecoach concern, weekly accounts delivered by the plaintiff to the defendant, by which it appeared that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the week, are not evidence of proper matter of set-off. To become matter of set-off the balance in the partnership account must be final. Fromont v. Coupland.

SHERIFF.

See Execution.—Judgment.

1. If after a sheriff has returned to a fi. fa. for 301L, that he has levied only 13L, the plaintiff goes and receives that 13%, he cannot maintain an action for a false re-Beynon v. Garratt and Venables.

154 2 If the plaintiff has bought sails of the sheriff, under an execution, with a knowledge that they are deposited at a sailmaker's, and does not apply for a delivery till after the time when the sheriff is bound to pay over the money; he can maintain no action against the sheriff if the sail-maker refuses to deliver them up. Duncan v. Garratt and Another. 169

3. The issue that R. and Y. became bail at the request of the sheriff, is proved by showing that they became bail at the request of the sheriff's officer, to prevent the sheriff from being fixed. Evans v. Sweet. 277

4. If a levy is made by the sheriff, and the proceeds paid to the execution creditor, and trover is brought by the assignees of the person against whom the execution issued, he having become bankrupt: if the sheriff suffers judgment in such action to go by default, he cannot recover back from the execution creditor the money he has paid him, if he (the sheriff) could have made a good defence to the action brought against him by the assignees, even though he gave notice to the execution creditor that he would de-

would furnish the grounds and means for his so doing. Austin v. Ward. 370, 507

SHIP.

558 1. In action for negligently steering a ship ' whereby she was wrecked, and plaintiff lost his passage in her—no evidence can be given of a specific act of negligence, which is not the foundation of the action. You may give evidence that the captain had often expressed his conviction that the officer to whom he gave charge of the ship was incompetent for that situa-tion. You may call experienced nautical men, and ask them whether, in their judgment, particular facts, which have been proved, amount to gross negligence. Malton v. Nesbit and Another.

2. A book kept at the India House from returns given on oath under the statute 53 Geo. 3, c. 155, of the number of passengers going on board India ships is evi-

dence.

An agreement between an East India ship owner and one of his captains, to exchange commands with another captain, is not illegal; and such an exchange of commands is a sufficient consideration for either party in an action on other terms of such an agreement.

The statute 49 Geo. 3, c. 126, relative to the sale of offices under the East India Company, applies only to their public offices, and not to the commands of their ships: these being merely in their trade as merchants. Per Bunnough, J. Richardson v. Mellish.

3. A person is not liable for goods supplied for the use of a ship, unless he either is owner, or has held himself out as such, or has made an express promise to pay, or has received profit from the ship. Harrington v. Fry. 289

SHIP'S REGISTER.

1. The registered owner of a ship is prima facie liable for goods furnished for the use of that ship, but such presumption of liability may be rebutted by evidence of the credit having been given to others. Cox and Others v. Reid and Another. 602 2. If there be a bill of sale of a ship-note containing any qualification, and such unqualified bill of sale be entered properly on the register, and there be also a deed of defeasance, making void such bill of sale on the payment of a sum of money. The deed of defeasance may be given in evidence on the part of the defendant charged in an action for goods. as the registered owner, in order to show the qualified nature of such defendant's ownership.

SHIPPING-NOTE.

find the action if the execution creditor A consignee of goods delivering over to a

INDEX. 404

third person the shipping-note of such goods, and a delivery-order on the wharfinger to deliver such goods as soon as 2. Whether an agreement they arrive, does not pass the property in them so as to prevent a stoppage in transitu by the the consignor. Akerman v. Humphrey.

SHOOTING.

If a person shoots at another who is endeavoring to apprehend him, he may be convicted on the usual indictment for shooting with intent to murder; though shooting to prevent apprehending is also 2. If tenant in fee of a ma a distinct captital offence under Lord Ellenborough's act. Rex v. Davis. 306

SLANDER.

1. Slander of a school for filth and bad food; which was justified. To rebut the justifications the plaintiff's counsel cannot ask how boys are treated at any other particular school; nor can he ask as to the manner of their education; because If the vendor of tallows in it was not called in question by the slander. Boldron v. Widdows.

2. If the plaintiff has applied to the undersheriff of Middlesex to appoint him a sheriff's officer, and in answer to the inquiries of the under-sheriff as to his fitness, the defendant, another officer to whom the plaintiff had been a bailiff's follower, says, he robbed him: such communication is confidential; and as much privileged as the communication of a master in giving a character to a servant; and in such a case it is competent to the master, under the general issue, to put in proof any fact which goes to show that in making the slanderous assertions, he was not actuated by malice. Sims v. Kinder.

See Bromage and Prosser. 475, 673 3. If the defendant let judgment go by default, and on the execution of the writ of inquiry neither party goes into any evidence, the jury may give such moderate damages as they think right. Tripp v. Thomas.

SOLICITOR.

See PAUPERIS FORMA.

STAGE-COACH.

See Notice, 3.

Whether writing mourning on a money-parcel is a fraud on the stage-coach proprietor-Quære. Mayhew v. Eames.

STAMP.

See TENDER.

1. An attested copy of a deed on a 1s.

stamp is admissible as dence. Ditcher v. Kenrie letters containing less th requires a stamp of I Parkins v. Moravia.

53 3. A release to two joint ac requires but one stamp.

STEWARD

1. The appointment of a pe of a manor for life is g

points a steward of that life, and devises the ma third person, such appoi and he cannot be aftern by the devisee.

STOPPING IN TR

See SHIPPING-N

of the London Dock Con tallows, and give an ord the company, by which t " to weigh, deliver, transf the tallows to Messrs order being received at M. and B. having sold the ceived the money for th vendor cannot stop them the company, though th not been weighed. It as weighing, if the sale take did) soon after the imp usually required; the w the custom-house duties such case being conside ties as correct and suffici Another v. Boddington, E

STOCK.

See Boxn, 2

STOCK-JOBBI

In an action on a bill of exc broker may refuse to giv the consideration of it wa differences; but whether produce his book kept 7 G. 2, c. 8, s. 9-Quære Hall.

SUIT, MALICIOUS, AI

The defendant had taken t special pleader, as to wh tiff was liable for a debt; was favorable to the d defendant caused the arrested for it. In action charged to be malicious,

for the plaintiff; and the Court above would not disturb the verdict. Revenga v. Macintosh.

SUNDAY.

In an action for a breach of warranty of a horse, the defendant cannot be allowed to set up that he was a horse-dealer, and sold the horse on a Sunday, contrary to the provisions of the stat. of 29 Car. 2, c. 7. Bloxsome v. Williams. 294, 336

SURETY.

A letter from a surety for a collector to the obligees of his bond, stating that he will 2. A tender to a collector appointed by the not be liable after the date of the letter, is no defence to an action on the bond for a deficit subsequent to the letter, if it be not pleaded specially. If it be so pleaded-Quære. Hough and Another v. Warr.

SURRENDER.

See TERM.

SURVEYOR.

1. If he makes an estimate considerably erroneous, from not examining the ground for the foundation, he is not entitled to recover for his plans, &c. Money-352 penny v. Hartland.

2. If he is a shareholder he can maintain no action. Ibid.

3. Semble, If the Committee under a Bridge Act employ him, the trustees, not the committee, are liable to his action for payment.

TALES.

1. Since the stat. 7 & 8 W. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the by-standers. Rex v. Hill.

2. On a trial of an information in nature of a quo warranto, which has been made a special-jury cause, jurors who have been summoned to try the prisoners on the crown side of the assize, are not thereby qualified to act as talesmen. Rex v. Tipping. 668

TENANT.

1. In an action of debt on 11 G. 2, c. 19, against a tenant, for fraudulently removing his goods to avoid a distress; it is immaterial whether the removal is in nant's sons removed the goods, with his consent, will support a declaration against him for removing the goods, and them, for assisting him in such removal. Lyster, Esq., v. Brown and Others.

2 Under a covenant that tenant "should

and would substantially repair, uphold, and maintain" a house, he must keep up the inside painting. Monk v. Noyes. 265

TENDER.

1. A plea of tender is not supported by proving that the defendant took a sum of money out of his pocket, and said to the plaintiff, "If you will give me a stamped receipt. I will pay you the money:" as by the stat. 43 G. 3, c. 126, the payer of money may provide the stamp and charge for it: and a tender must always be unconditional. Laing v. 257

solicitor to a commission of bankrupt, is not good; he having no discretion on the subject. Blow v. Russell.

3. If a person tender money, but will not pay it unless the person to whom it is tendered will give him a receipt in full of all demands, such a tender is bad. Griffith v. Hodges.

TERM.

If no evidence is given of the existence of a term to attend the inheritance, since the year 1793, and the owner of the fee has acted as if it had been surrendered, the jury may presume that it has been surrendered; the purpose for which the term was created having been long since fulfilled. Bartlet v. Downes.

THEATRE.

Ibid. In an action against a performer for not performing at a licensed theatre, pursuant to his contract, evidence that the performances have gone on without interruption, is sufficient prima facie evidence that the theatre is duly licensed. Rodwell v. Redge.

THREATENING.

See ROBBERY.

TITHE-COMPOSITION.

A tithe-composition being at one undivided sum from Michaelmas to Michaelmas, the tenant going away at Lady-day must pay up the composition to the ensuing Michaelmas. Hulme, Clerk, v. Pardoe, Widow. 93. 33G

TITHES.

the night or not. Evidence that the te- 1. In an action by a vicar for not setting out prædial tithes, proof of a single payment to him, or any of his predecessors. of that species of tithe, is evidence to go to the jury, that the vicars of that place are endowed with that species of tithe. Apperley, Clerk, v. Gill.

2. On issues to try moduses, owners of |3. If A. sells corn to B., who lands in the parish are not competent witnesses; and the depositions of such witnesses as are dead, cannot be read, if it is shown that they were interested, though no such thing appears in the deposition, and though their evidence was Jones and Others v. Carread in equity. rington, Clerk.

3. Receipts of a vicar's lessee are admissible evidence of a modus, which is sufficient proof that he is lessee. S. C. 329

4. If a witness prove that her father and 5. In trover, the jury are not brother were tenants of tithes for above forty years, that is sufficient to let in their receipts, without proving a lease to them. S. C. 497
5. If a modus is laid, in an issue from

Chancery, to extend over a whole parish, and the jury so find, the Court of Chancery will not grant a new trial, because a hamlet, in the tithes of which neither plaintiffs nor defendant were interested, 1. In action of covenant, in was a part of that parish, and not covered by the modus.

6. If, at the trial, an interested witness, who brought documents, was allowed to give inadmissible evidence to support them; yet a Court of Equity will refuse a new trial, if there was enough to support the Ibid.

verdict without them.

TRESPASS.

See WITNESS, 16.

1. If parties having a right to a garden, 2. An indictment for stealing have given another notice not to trespass there, and afterwards they give that person half a year's notice to quit all gardens held of them, at a time later than all the alleged trespasses; they can bring no action for such trespasses, because they have since acknowledged the defendant as their tenant. Barton and Others v. 664

2. A dog jumping into a field without the consent of his master is not a trespass.

Brown v. Giles.

TROVER.

See BANKRUPT, 14.

1. An insolvent cannot maintain trover for plate, though his assignee does not interfere to prevent him. Lea v. Telfer.

2. A horse was kept at the defendant's stables; and one day when he was from home, three or four of his servants being in charge of the premises, the horse was taken away. The defendant blamed the ostler for letting it be taken; but on being himself remonstrated with, replied, that it was of no consequence, because he was indemnified .- Held, that in such case, trover would not lie. Barnard, Assignee of Thurtell, v. How.

lation, and the corn is warehouse of C., (the gra-B.) who is told that he is to account of A., A. has a perty in it to enable him to ver against C. Woodley 4. And a return made by A.

1 & 2 G. 4, c. 87, s. 12, of sold and delivered to B., is evidence against A. of a conditional sale and deliv-

as damages the mere val perty at the time of the they may find as damages subsequent time, in the Greening v. Wilkinson.

VARIANCE.

See PRACTICE, 9,

deed, if the word "an" is of "one;" and the name of "Burt:" these are not

Nor is the stating a lea years, and proving it to l terminable at the option at the end of seven or fou

If the defendant allege: by it, and the plaintiff, in traverse that plea, he is show that A. had only ar and need not reply that v. Sanders.

nace" in the county of ported by evidence of s furnace in the county of I it there, and bringing Rex v. Holloway H.shire.

3. An indictment for steal not supported by proof dead turkies. S. C.

- 4. Semble, That in actions prosecution, the record, the indictment, saying, did make an assault, really saying, "did then an assault," is no varia the judge at the assizes w amended on summons, word "plaintiff" for the ant," in the record. Free
- 146 5. "Adjoining the new hor "adjoining the new hous riance in an indictment an answer in Chancery, jury is not assigned on as to this clause of the a v. Spencer.

Proof that a conveyance to a person named by the support an averment in that he himself "became

Seaman v. Price.

7. If the declaration state that the defendant being owner of a stage-coach, undertook to carry " the plaintiff, her children, and stage coach"-Evidence, that the whole inside of the coach was taken for the ·plaintiff and her three daughters, and two outside places for her servants, will support the declaration, Long v. Horne.

VENUE.

See Variance, 2.

VETERINARY COLLEGE.

See Usage of Trade, 2.

A certificate of the Veterinary College is not evidence, not coming from a body known to the law. Sewell v. Corp. 392

USAGE OF TRADE.

1. The usage of trade must be certain and universal, to make it binding on transactions in such trade. Wood, Assignee of Hall, v. Wood.

2. Persons employing one of a trade or profession, where there is a general usage, will be taken to have dealt with him according to that usage. Sewell v. Corp.

3. Usage for a veterinary surgeon to charge for his attendances, when much medicine was not necessary, is too uncertain. Ibid.

USE AND OCCUPATION.

See SET-OFF. 2.

If there has been an agreement for a lease, on which the defendant was let into possession, and it is not proved that a lease was tendered, signed by proper lessors, the owner of the premises cannot maintain an action for use and occupation. Rumball v. Wright. 589

USURY.

See Pleading, 3.

A security given in lieu of a former security, which was tainted by usury, is void; unless in the second security a deduction is made of all sums paid usuriously under the former security. Wickes v. Gogerly. 396

WAGER.

If an action for money had and received is 1. Whether, in an action for work and brought against the stake-holder, on a dog-fight, to recover the stakes, on the ground that the plaintiff's dog won, the judge will order it to be struck out of the cause paper, as he will not try which Purzeman.

WARRANTY.

See FRAUD.

servants together, in and by a certain If a commodity having a fixed value is sold for a particular purpose, and it turns out unfit, whether an action lies, though there has been no warranty-Quære. Gray and Another v. Cox and Another. 184, 491

WAIVER.

1. A person having a hen upon goods, does not waive that lien by the mere fact of his omitting to say that he claims the goods in that right, when they are demanded.

Nor is it sufficient evidence of a waiver of his lien, that he bought these goods with others, and also refuses to deliver up the other goods, though he has no ken on them; the sale of both sets of goods being void. White and Another, Assig-

nees of Syme, v. Gainer. 324
2. If ejectment is brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accepts rent, it is no waiver of the forfeiture Doe, d Morecraft, v. Meux.

WHARF.

By a private act of Parliament, the London Dock Company was to be sued for injuries within six months after the fact committed:-Held, that the limitation ran from the time of the consequential injury happening; the act at first not being tortious or injurious. Gillon v. Boddington. 541

WHARFINGER.

If goods be sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board it. Semble, that it is his duty, either by himself or his servants, to see the goods put on board, and then make an entry of the shipment. Leigh v. Smith.

WITNESS.

See Attorney, 4.—Cross-Examination, 1. -Driving, Negligent, 4.-Evidence, 4.—Expenses, 1.—Marriage, Breich of PROMISE OF, 1 .- PLEADING, 1 .- PRAC-TICE, 6.

labor, the party who actually did the work is a competent witness to prove that he, and not the plaintiff, is the person to be paid—Quære Martin v. Jackem.

dog won the battle. Egerton, Esq. v. 2. The defendant having contracted to re-613 build a house, employed the plaintiff to do the bricklayers' work. The owner of the house, who had paid neither of them, is a competent witness to prove that the plaintiff did the work. Goodman v. Love. 76

Though the counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, the judge will sometimes call those omitted to be called for the prosecution. Rex v. Simmonds.

 Witnesses cannot be cross-examined to facts not in issue, if such facts are injurious to the characters of persons not

connected with the cause.

In seduction cases the plaintiff's counsel may call witnesses to the general good character of the party seduced, if her character has been attacked in cross-examination. Bate, Widow, v. Hill. 100

In all cases where the validity of a commission of bankrupt is tried, every creditor of the estate is incompetent as a witness. Hallen v. Homer. 108

6. In trespass quare clausum fregit, if the defendant justifies inter alia that the locus is a free wharf for the inhabitants of O, an inhabitant of O. is an incompetent witness; but if the defendant's counsel consent to waive that plea, he is competent. Prewit v. Tilly.

7. The assistant to a sheriff's officer, who is left in possession under an execution, is a competent witness for the sheriff, in an action for a false return. Clark v. Lucas and Another.

8. A factor having pledged goods to several persons, the factor is a competent witness in an action of trover against the parties having the goods. Greenway and Another v. Fisher and Others. 190

 A person is a competent witness for the plaintiff in an action for goods sold, though he is to receive a commission on the sale. Murley and Another v. Langrick.

10. If a bankrupt has had his certificate and has released his assignees, it is sufficient, on an objection to his competency as a witness, for him to state that he has released his assignees, without producing the release. Carlisle and Others, Assignees of Russel, v. Eady.

11. In an action by the assignees of an insolvent debtor, to recover money from one of the creditors, which ought to have gone to the general fund, the insolvent

is not a competent witness on the part of the plaintiff. Rudge and Another v Ferguson. 253

12. If a witness being cautioned that he is not obliged to answer questions which tend to criminate him, still does answer such questions, he cannot afterwards take the objection to any further question, relative to that whole transaction.

Dixon v. Vale and Others. 278

13. The widow of a deceased person is a competent witness for the plaintiff in an action brought against the executors of such person, on a promise made by him in his lifetime. Beveridge v. Minter. 364

14. The judge at a trial will not compel a witness to say where he lives, if he states that he believes a bailable writ is out against him at the instigation of the party asking. Watson v. Bevern. 363

15. An articled clerk to an attorney, who is bound by his articles to keep his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secrecy, nor affecting the interest of his master's clients; though the disclosure may go to support a civil action against the master. Webby v. Smith.

16. A defendant in trespass who has suffered judgment to go by default, is not a competent witness for other defendants in the same action, who have pleaded, if the jury have to assess the damages against him, as well as to try the issue as to the other defendants. Mash v. Smith and Others.

17. If a paper be put into the hands of a witness to refresh his memory, the coursel on the opposite side have a right to see it, but if it is merely given to him to prove a hand-writing to it, they have not Sinclair v. Stevenom.

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18. If a creditor of a bankrupt agrees to release the estate, on an undertaking by the assignees to pay him what should appear to be justly due, he is a competent witness for the assignees. **bid**

WORK AND LABOR

See CREDIT, 1.

WRIT OF INQUIRY

See SLANDER, 4.

REPORTS

OF

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

COURTS OF KING'S BENCH AND COMMON PLEAS,

AND ON

THE CIRCUIT:

FROM THE SITTINGS IN RASTER TERM, 1825, TO THE SITTINGS IN TRINITY TERM, 1827.

BY

F. A. CARRINGTON AND J. PAYNE, Esqrs.,
OF LINCOLN'S INK, BARRISTERS AT LAW.

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AT

NISI PRIUS.

COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, IN EASTER TERM, 1825.

BEFORE MR. JUSTICE BAYLEY.

(Who sat for the Lord Chief Justice.)

WALDO v. MARTIN.

If a covenant is entered into, that is the plaintiff will procure the defendant to be appointed to an office, he will pay the plaintiff a share of the emoluments; and this be without the knowledge of the person who has the right of appointing to the office; this is such a fraud on him as will avoid the covenant, whether the office is one lawfully saleable or not

COVENANT. This action was brought on a deed, by which the defendant covenanted to account to the plaintiff for a moiety of the profits of the office of bag-bearer of the Pipe-office of the Exchequer. This office had been held by the plaintiff, but he, on the making of this bargain, resigned it, and procured the situation for the defendant. There were several special pleas; and on the pleadings three questions were raised—First, whether this was an office touching the administration of justice, and therefore not legally saleable. Secondly, whether it was an office touching the receipt of the public revenue, *and therefore not saleable.† Thirdly, whether this bargain was

[†] By the statute 5 & 6 Edw. 6, c. 16, it is enacted,—s. 2, 'That if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, teward, or any other profit directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward or other profit, directly or indirectly, for any office or offices, or for the deputation of any office or offices or any part of any of them; or to the intent that any person should have, exercise or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them; which office or offices, or any part or parcel of them, shall in any wise touch or '21. XII.—53

made without the knowledge of Mr. Farrer, who had the right of appointing to this office, and therefore was so much in fraud of Mr. Farrer. as to make the bargain void.

concern the administration or execution of justice, or the receipt, controlment or payment of any of the king's highness' treasure, money, rent, revenue, account, aulnage, auditorship or surveying of any of the king's majesty's honors, castles, manors, lands, tenements, woods or hereditaments; or any of the king's majesty's customs, or any other administration or necessary attendance to be had, done or executed in any of the king's majesty's custom-house or houses; or the keeping of any of the king's majesty's towns, majesty's custom-house or houses; or the keeping of any of the king's majesty's towns, castles or fortresses, being used, occupied or appointed for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of court of record, wherein justice is to be administered; that then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward or profit, for any of the said office or fifties, deputation or deputations of any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond or assurance for any money, reward or profit, to be given for any of the said office or offices, or any part of any of them, shall not only lose and forfeit all his and their circly, interest and estate which such person or persons shall then have of in or to any right, interest and estate which such person or persons shall then have, of, in or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any of the said office or offices, deputation or deputations. for the which office or offices, or for the deputation or deputations of which office or offices. or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward or profit, or any promise, covenant or assurance to have or receive any fee, reward, money or profit; but also that all and every such person or persons, that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond or assurance for any of the said offices, or for the deputation or deputations of any of the said office or offices, or any part of any or for the deputation or deputations of any of the said office or offices, or any part of any of them, shall immediately, by and upon the same fee, money or reward given or paid, or upon any such promise, covenant, bond or agreement had or made for any fee, sum of money or reward to be paid as is aforesaid, be adjudged a disabled person in the law, to all intents and purposes, to have, occupy or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee or reward, or make any promise, sevenant, bond or other

And by s. 3, it is enacted, 'That all and every such bargains, sales, promises, bonds, agreements, covenants and assurances as before specified, shall be void, to and against thim and them by whom any such bargain, sale, bond, promise, covenant or assurance

shall be had or made.

But as to government offices and offices in the gift of the East India Company, this statute is much extended by the stat. 49 Geo. 3, c. 126, which enacts,—s. 1, 'That the said act and all the provisions therein contained, shall extend and be construed to extend to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown, and all commissions, civil, naval or military, and to all places and employments, and to all deputations to any such offices, commissions, places, or employments in the respective departments or offices, or under the appointment or superintendance and control of the lord high treasurer or commissioners of the treasury, the secretary of state. the lords commissioners for executing the office of lord high admiral, the master general and principal officers of his majesty's ordnance, the commander-in-chief, the secretary at war, the paymaster general of his majesty's forces, the commissioners for the affairs of India, the commissioners of the excise, the treasurer of the navy, the commissioners of the navy, the commissioners for victualling, the commissioners of transports, the commissary-general, the storekeeper-general, and also the principal officers of any other public department or office of his majesty's government in any part of the united kingdom, or in any of his majesty's dominions, colonies, or plantations which now belong or may hereafter belong to his majesty, and also to all offices, commissions, places and employments belonging to or under the appointment or control of the united company of merchants of England trading to the East Indies, in as full and ample a manner as if the provisions of the said act were repeated as to all such offices, commissions, places, and employments, and made part of this act: and the said act and this act, and all the clauses and provisions therein respectively contained, shall be construed as one act, as if the same had been herein repeated and re-enacted.

And by the latter sections of this act, all persons concerned in transactions of this sort. as buyers, sellers, agents, &c., are to be deemed guilty of a misdemeanor; but there is a provise that this act is not to extend to sales of commissions and appointments in the band of gentlemen pensioners, or the yeomen of the guards, or in the marshalsea, or the palace court, or to commissions in his majesty's forces according to regulations. And it is provided by s. 10, that 'nothing in this act contained shall extend or be construed to extend to prevent or make void any deputation to any office, in any case in which it is lawful to appoint a deputy, or any agreement, contract, bond, or assurance lawfully made in respect of any allowance, salary, or payment made or agreed to be made by or to such principal or deputy respectively, out of the fees or profits of such office.'

*Evidence was given to show clearly, that the office was not one touching the administration of justice; but, on the second point, it was proved that the officers of the Pipe-office receive certain arrears of taxes from the sheriffs of the different counties at the Pipe-office in Somerset House, which money so received, it is the duty of the bag-bearer to carry to the Receipt of the Exchequer at Westminster. On the third point, Mr. Farrer was called: he stated that he was first secondary in the Pipe-office; and that, as *such, he had the right of appointed the defendant, at the solicitation of the plaintiff; but that he knew nothing of this bargain relative to the profits; and that he highly disapproved of it, on discovering that it had taken place. Mr. Farrer, however, stated that he had known the Pipe-office for eighty years, having been appointed to a situation in it in the year 1745, and that he had known this office of bag-bearer sold more than once. It was an office held for life.

BAYLEY, J. It is proved that Mr. Farrer did not know of this bargain, and there is therefore no doubt that the defendant was appointed by a fraud on Mr.

Farrer.

Denman. But if this is an office legally saleable, I submit, that Mr. Farrer's knowledge of the bargain is immaterial.

BAYLEY, J. I think not.
'The learned Judge directed a

Nonsuit.

Denman, and Brougham, for the plaintiff. Scarlett, and Chitty, for the defendant.

[Attornies-W. Roberts, and Hurd & Johnson.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Denman moved for a rule nisi, for a new trial, and argued, that this was an office legally saleable, and cited Sparrow v. Reynold, 26 Car. 2, in C. B. Bac. Abr. tit. *Officer, (F), Godbolt's case, 6 Leon. 23; and Blankard v. Galdy, 4 Mod. 223.†

And by s. 11, 'That nothing in the said act or in this act contained shall extend to any annual reservation, charge, or payment made or required to be made out of the fees, per quisites, or profits of any office to any person who shall have held such office, in any commission or appointment of any person succeeding to such office, or to any agreement, contract, bond, or other assurance made for securing such reservation, charge, or payment: provided always, that the amount of such reservation, charge, or payment, and the stated in the commission, patent, warrant, or instrument of appointment of the person so succeeding to and holding such office, and paying or securing such money as aforesaid.'

† In the case of Sparrow v. Reynold, it was said, that a seat in the six clerks' office is a saleable office, as being ministerial only. But that one judge thought the sale bad at common law, as against public policy. In Godbolt's case, the sale of the office of bailiff of a hundred, was held not to be within the statute. Blankard v. Galdy, was the case of a provest marshal of Jamaica, but the court did not decide whether his was an office touching the administration of justice, the case being decided on the ground that the stat. of Edw. 6 did not extend to the colonies.

In Dr. Trever's case, it was resolved by the judges, on a reference to them by the Lord Chancellor, that the offices of chancellor, registrar, and commissary in Ecclesiastical Courts, are within the stat, 5 Edw. 6, because they 'concern matters about matrimony, and legitimation, which touch the inheritance of the subjects, and about matters of legacy for chattels real and personal; and in that respect are Courts of Justice; and therefore the offices in these courts are within the stat.' Cro. Jac. 269; & 12 Co. 78, S. C.

*Abbott, C. J. Supposing that this is a saleable office, and that it was procured by purchase, Mr. Farrer not knowing of the bargain, is not that such a fraud on him as will avoid the bargain?

Denman then went on certain affidavits, which tended to show that Mr. Farrer was mistaken, and that he really did know of the bargain, but had for-

gotten it: however, that was not at all clearly shown.

ABBOTT, C. J. I think that there should be no new trial in this case, for without considering whether the office touches the administration of justice or the public revenue, this agreement being entered into without the knowledge of Mr. Farrer, is such a fraud on him as will make that agreement void, and unavailable in point of law; as when Mr. Farrer appointed to the office, he considered that the appointee was to have the profits; and by this agreement, that is not to be so; and by those means he is made to appoint to the office for the profit of a person whom he does not intend. I think, therefore, the nonsuit was right.

Holroyd, J. I think the circumstances attending this bargain are such as to make it unavailable, on the ground that it was in fraud of Mr. Farrer.

LITTLEDALE, J., concurred.

Rule refused.

*SITTINGS IN LONDON, AFTER EASTER TERM, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

BAROUGH v. WHITE.

The declarations of a former holder of a promissory note payable on demand, made while he was the holder, are not evidence for the defendant in an action by a subsequent holder, unless the note had been presented for payment before such declarations were made.

Assumpsit on the joint and several promissory note of the defendant and his brother, dated September 20, 1823, and payable on demand to a person named

On the question, what amounts to a sale.—In the case of Culliford v. Dr. Pardonell, 2 Salk. 466, it was held, that a bond by a deputy to pay half the profits of his office to his principal, was not within the statute; as that was in effect giving the deputy the other half as a salary for his services. And in Godolphin v. Tudor. 2 Salk. 468, and 6 Mod. Rep. 234, (but which is best reported from a MS. of C. J. Willes, in Willes, Rep. by Durnford, 575, n.) it was held, after three arguments, that if an officer has certain annual profits, a deputation of his office, reserving any sum not exceeding the amount of the certain profits, is not contrary to the statute. So, if the profits be uncertain, and the deputy be to pay so much out of the profits. But if the office consist of uncertain profits, and the deputy be to pay a sum certain annually, this will be a sale within the statute. And the case is not altered by the office answering more in contingent profit, than the money stipulated to be paid.

In Huggins v. Bainbridge, Willes, 241, it was held, that a bargain, that the plaintiff should surrender the office to the king, to the intent that the plaintiff should procure it for the defendant, is void within the statute. And in Layng v. Paine, Willes, 571, a bond to resign, whenever the person appointing chose, was held void.

As to agreements for the sale of such offices which are not within the statutes, being void as against public policy; see Parsons v. Thomson, 1 H. B. 322. Garforth v. Fearon. 1 H. B. 327, and Hancington v. Duchstel. 1 Br. Ch. Ca. 124.

1 H. B. 327, and Hancington v. Duchatel, 1 Br. Ch. Ca. 124.

Arnet, who had indorsed it to the plaintiff. The formal proofs having been adduced for the plaintiff—

Cross, Serjt., and Archbold, for the defendant, wished to give in evidence a conversation of Arnet, which occurred at the time when he was the holder of the note, impeaching its consideration.

Scarlett, for the plaintiff, objected, that the declarations of Arnet were not evidence, because the only case in which the declaration of the holder of the bill is evidence, is when such bill is indorsed after it is over-due.

Cross, Serji., and Archbold. This being a note payable on demand, it is in the same situation, and is governed by the same rules as a bill over-due. And they cited Brown v. Davis, 3 T. R. 80.

ABBOTT, C. J. Can you show a demand of payment before this conversation with *Arnet?* as that would place this note in the situation of a bill over-due.

Cross, Serjt. My Lord, I cannot: but I am in a condition to show that the note was in the possession of *Arnet*, at the time of the conversation.

*Scarlett. If a man takes a bill over-due, he sees that it is so; but with a note like this, the defendant would have all the same advantage on the day after it was signed, that he would a year afterwards.

Abborr, C. J. I am of opinion that the evidence offered is not admissible.

Verdict for the plaintiff.

Scarlett, and Brougham, for the plaintiff. Cross, Serjt., and Archbold, for the defendant.

[Attornies—Smith & S., and Lever.]

In the ensuing term, Cross, Serjt., moved for a rule nisi, to set aside the verdict, on the ground that the declarations of Arnet were improperly rejected at the trial, and he cited the case of Pocock v. Billing, ante, 230, but the Court refused the rule.—Abbott, C. J., observing, that the Court considered that the observations of the Court of Common Pleas as to the declarations of the holder of a bill, were, to a certain extent, extra-judicial, as that point was not at all brought into question in that case.

The case of Taylor v. Mather, 3 T. R. 83, n., was an action by the indorsee of a note against the maker. It was indorsed after it was due, and there was evidence given that the note had been originally obtained by fraud. Buller, J., said, it never had been determined that a bill or note is not negotiable after it is due, but if there are any circumstances of fraud in the transaction, and it is indorsed to the plaintiff after it is due, I have always left it to the jury, on the slightest circumstances to presume that the indorser was acquainted with the fraud; and the rest of the court concurred in this opinion.

In Brown v. Davies, 3 T. R. 80, Ashurst, J., held, that the circumstance of a bill or note

In Brown v. Davies, 3 T. K. So, Askers, J., held, that the circumstance of a bill or note being over-due is alone such a suspicious circumstance, as to make it incumbent on one tosatisfy himself that it is good; and Baller, J., held, that if a note were over-due, (though his Lordship would not say that it was not by law negotiable,) that gave rise to *suspicion; but generally, when a note was due, the party receiving it, took it on the credit of the person he received it from. Lord Kenyon, C. J., agreed to this, if the note appeared on the face of it to have been dishonored, or if knowledge could be brought home to the indorser that it had been so; but his Lordship added, "I should think otherwise if notice cannot be fixed on the party; at least I am not prepared to go that length at present."

And Mr. Justice Bayley, in his work on Bills of Exchange, (page 118,) lays down, that "a man who takes a bill after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it."

ADJOURNED SITTINGS AT WESTM, AFTER EASTER TERM, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

REX v. WIBLIN.

Practice.—Scire facias on a forfeited recognizance. Mode of proceeding.

Scire facias. The writ of scire facias stated that the defendant had before a magistrate entered into a recognizance in the sum of 20l. to keep the peace for one year towards all his majesty's subjects: it then suggested that he had since that time, and within the year, assaulted John Tambins and Susannah Tombins; and the sheriff was commanded to make it known to the defendant that he might show why the said sum should not be levied on him.

Plea, that the defendant ought not to have the sum levied on him, because

he was not guilty of those assaults on which issue was joined.

Evidence was adduced to show that he had committed those assaults.

Verdict for the Crown. [*11

*Gurney, and Steer, for the crown. The defendant in person.

[Attornies-Harmer, and In person.]

When a person has entered into a recognizance to keep the peace, which becomes forfeited by his committing any breach of the peace; if it was acknowledged at the sessions,
or before a magietrate, a writ of certiorar's must be obtained to remove it into the crownoffice. This writ is obtained on laying an affidavit of the circumstances before a judge at
chambers, who will grant a fiat for the writ to issue; when the writ has been served, and
the recognizance is returned, a writ of scire facias is sued out at the crown-office, stating
the recognizance, and suggesting the breach of it. This is delivered to the sheriff of the
county in which the defendant resides, and he gives notice of it to the defendant, who
must enter an appearance in the crown-office, and plead any matter in defence; and en
this issue is joined, and that issue tried in the same way as any other issue joined in the
crown-office, except that no preclamation is made at the trial, there being no crime to be
tried. If the jury find that the recognizance has been forficited, they find a verdict for the
erown, and judgment is entered up, and a f. fs. or cs. ss. issued out of the crown-office for
the amount of the recognizance; but if to those writs there be a return of sikil erase set,
or if the proceedure takes no steps on the judgment so signed, the recognizance is corrected
into the Exchequer by the master of the crown-office, in the same way as a recognizance
forfeited by the non-appearance of a party to receive judgment; and process on it issues
from the Exchequer.

ADJOURNED SITTINGS IN LONDON AFTER EASTER TERM, 1825.

DOWNE v. HALLING et al.

The plaintiff having lost a check five days after it bore date, which was taken by the defendants for value, but under such circumstances as ought to have excited their suspicion, held, that the plaintiff may maintain an action for money had and received against them for the amount of it, though he gives no evidence of how he lest it, or of how it set of him to a supplementation. if get out of his possession.

Whether such evidence would have been necessary, if the check had been received by the

defendants on the day it bore date-Quere.

Money had and received. This action was brought to recover the value of a check, dated the 16th of *November, 1824, for 50l., drawn on Sir P. Pole & Co., payable to the plaintiff, or bearer.

It was stated and proved, that the plaintiff had received this check from his brother, Mr. Edward Downe; and it was opened that it had either been lost by, or stolen from the possession of, the plaintiff's wife, at a shop in the Royal Arcade, (but of the loss no evidence was given;) and it was proved by the admission of one of the defendants, and by the evidence for the defence, that the defendants were linen drapers, carrying on extensive business in Cockepur-street, London, and that, on the evening of the 22d of November, 1824, they received this check in payment for two shawls, of the price of 61. 62., and that they gave 481. 14s. cash in change. They received it from a woman, who gave her address as "Mrs. Jones, Leader-street, Brompton;" but they did not know her. This person stated that she could not write well; and the defendant's shopman wrote that address on the back of the check. It further appeared, that this person came alone to the shop, and not in a carriage, but that her appearance was respectable; and that on the check being shown to one of the defendants, for the purpose of examining whether it was forged, he said, they might take it and give the change. It was also proved, that on one of the defendants being asked whether they were in the habit of receiving checks of strangers, he said that they never did so, unless it was of a person who came in a carriage, or who appeared to be highly respectable, or who laid out a great part of the amount in goods; and it was also proved, that, on the morning after the defendants received the check, they sent a person with it to Sir P. Pole & Co.'s bank, and got a 501. note for it, which note they paid into their own banker's hands, instead of paying the check into their banker's hands, and letting them get cash for it, as was their custom, and as they did with several other checks on the same day; and their own banker's counting-house being rather nearer to the defendant's house of business than that of Sir P. Pole & Co. *Under these circumstances it was contended, on the authority of the case of Gill v. Cubitts, ante, vol. I. p. 163, 487, that the defendants had used so little caution in the taking of this check, and that the fact of its being so many days after date, coupled with the other circumstances of the case, ought to have excited such a suspicion in their minds, as to have caused them either to refuse to take the check, or to do so at their own risk.

Denman, for the defendants, argued, that the action was not maintainable, as the very foundation of it was the check having been stolen or lost: now, there was no evidence of either; and, for aught that appeared, the plaintiff might

himself have paid it away for value.

Scarlett. My answer to this is, that we prove the check to be ours, and call on the defendants to show how they got it.

Denman. It is payable to bearer.

Abbott, C. J. I do not think I ought to nonsuit.

Demman then addressed the jury, and argued, that checks were often in circulation for a considerable number of days; and this being payable to bearer, it carried its own authority with it, unless there were some circumstances to take it out of the general rule: and the question for them was, whether the defendants had given value for the check, and had acted bonu fide; and as to the supposed negligence of the defendants, they could at most have only used this additional caution, that if it had not been paid to them at the banking-house, (which it was,) they might have sent to Sir P. Pole's banking-house to know if it was a good check, and would be paid: and that would have made no difference, as they would have been told that it was good.

*Abbott, C. J., in summing up the evidence to the jury, said, The plaintiff, who was owner of this check, alleges, that the defendants have received the money on it, having taken the check under such circumstances as might fairly excite suspicion in their minds; and if you are of opinion in point of fact that the defendants did take this check, under such circumstances as might fairly excite their suspicion, I am of opinion, in point of law, that the plaintiff is entitled to your verdict. I had the honor to lay that down in a case (Gill v. Cubitts) tried in this place, which has since received the sanction of the other judges. The defendants took this check on the evening of the 22d of November; and there is no mark upon it except the address of Mrs. Jones.

You are to say, whether they used due caution:—they take it of a woman they don't know, and who cannot write, or who can write but badly, and they take it for a small quantity of goods. The check is not drawn by her, nor is it even payable to a female: and you have it also in proof that the defendants sent it next morning to the bankers on whom it is drawn, and not to their own bankers, as was their habit, but that they pay the proceeds into the hands of their own banker. The case has been very property stated to be one where there is no imputation of the slightest fraud or collusion on the part of the defendants; but it is charged that they did not use due and proper caution: if so, the plaintiff is entitled to a verdict; but if you think that the defendants took this check in the fair course of trade, using as much caution as persons in the fair and ordinary course of business ought to do, you ought to find a verdict for the defendants.

Verdict for the plaintiff—Damages 501.

Scarlett, and F. Pollock, for the plaintiff. Denman, for the defendants.

[Attornies—Loddington & Hall, and Amory & Coles.]

*BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS. [*15

In Banc.

Denman now moved for a new trial on two grounds. 1st. That the plaintiff ought to have been nonsuited, because no evidence was given of the manner in which the sheck got out of his possession; and that, for any thing that appeared, he might have himself paid it away for value: and, 2d, that the Lord Chief Justice ought to have left it to the jury to say, whether the defendants took the check for value, and bona fide. It was conceded at the trial, that the defendants had acted without the slightest mala fides; and the most that they were charged with was negligence. Now, this was introducing a new rule into the law, to admit bona fides in the defendants, and then put it on the ground of want of prudence and caution; he therefore contended that the case should not have been left to the jury on the question of negligence.

BAYLEY, J. If a party takes a bill over-due, he takes it at his own risk.

Denman. It is very common for checks to remain out for some time; but I was arguing that these parties acted bona fide, and that the question to be left to the jury ought to have been, whether there was mala fides in the defendants or not, which was not the way in which it was put to the jury. Peacock v. Rhodes, Dougl. 611.

BAYLEY, J. It was left to the jury to say, whether the defendants had not received the check under such circumstances as would excite the suspicion of

a reasonable man.

ABBOTT, C. J. I did not put it on the ground of negligence, but whether the check was taken under circumstances of suspicion. On that point my Brothers are *perfectly satisfied. However, as there was no evidence of the loss of the check, but only that it was the plaintiff's property, we will defer our judgment; and if we should think that point ought to be further argued, we will grant a rule to show cause.

BAYLEY, J. Checks being intended for immediate payment, a check after

date is like an ordinary bill past due.

The court now gave judgment on this motion.

ABBOTT, C. J. The point raised by Mr. Common Serjeant, was, whether it was necessary in this case for the plaintiff to show how he lost this check. Mr. Scarlett said, it was proved to be the plaintiff's, and on that he relied. It was a check payable to bearer, which the plaintiff had received from his brother; and it also appeared that the defendant took it five days after date; and some of my Brothers consider this as exactly like the case of a bill overdue. That being so, it is not necessary to say whether the loser shall or shall not be in general required to show how he parted with the possession; it is not necessary to lay down any general rule, but I should be very unwilling to lay down any general rule requiring the loser to give such evidence; as in almost all cases of property stolen from the person, or from the private escrutoire, nay, even in the case of cattle stolen from a field, it would be nearly impossible for any such proof to be given; but in this case, it being shown that the defendants took this check five days after date, the plaintiff was entitled to call on them to show how they came by it; we shall, therefore, grant no rule.

Rule refused.

See the cases of Gill v. Cubitts, ante, Vol. I. p. 163, 487, and the notes to Barough v. White, ante. p. 8, and the cases of Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 3 Burr. 1516, and Peacock v. Rhodes, Doug. 611.

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*MILNER et al. v. MACLEAN et al.

To constitute a forcible entry, or a fercible detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer should be with such numbers of porsons and show of forces, as is calculated to deter the rightful owner from sending the persons away, and resuming his own possession.

TRESPASS on the stat. 8 Hen. 6, c. 9. The first count of the declaration was for a forcible detainer of two closes, situate in the parish of St. Mary, Islington, and stated, after reciting the statute, &c., "that the defendants, vi et armis, broke and entered the said closes, and then and there, in a forcible manner, and with a strong hand, kept and continued the said plaintiffs, so put out and disseised, for a long space of time, to wit, &c." The second count was for a forcible entry; the third was a common count for a trespass; and the fourth

for an expulsion. Plea-Not guilty.

It appeared, that the plaintiffs, being seised in fee of the ground in question, had entered into a treaty for the sale of it, with an intended company, called the Portable Gas Company; and in consequence of this, certain persons had, about the 13th of December, filed a bill for a specific performance of an alleged agreement to convey this property to them and others, for the purposes of that company: and on the 13th of December, 1824, six persons came on the ground, which was situate near Battle Bridge, at about eight o'clock in the morning, one of them having a drawn sword, which he placed upright in the ground; and they proceeded to drive pieces of wood into the ground, for the erection of two wooden huts. A person in the employ of the plaintiffs told them, they must not stay there; but they refused to go, and stated that they came there by order of the Portable Gas Company. On the next day, the plaintiffs' attorney, accompanied by another person, went to the place, and then found eleven persons there, some of whom were walking to and fro, and others were in the wooden huts which had been built; one of them had a sword, another a constable's staff, and some of the others sticks. They refused to give their own names, but *gave the names of the three defendants, on whose behalf it was admitted that they were sent. These persons, or some of them, remained in the place day and night, and refused to depart, and two of the number were remaining there up to the time of the trial.

The defendants' counsel contended, that as there was no assault committed, and no actual violence used; this was only a trespass, and not a forcible entry

or detainer.

ABBOTT, C. J. In this case there was, it is true, no one assaulted, nor is it necessary that there should be, to constitute a forcible entry; for, if persons either take or keep possession of either house or land, with such number of persons, and show of force, as is calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or a forcible detainer.?

† Actions for foreible entry, and foreible detainer, are founded on the stat. 8 Hea. 6, c. 9, s. 6, which enacts "that if any person be put out or disseised of lands or tenements in forcible manner, or put out peaceably, and after holden out with strong hand; or, after such entry, any feofiment or discontinuance in any wise thereof be made, to defraud and take away the right of the possessor; that the party grieved in this behalf shall have assise of novel disseisin, or a writ of trespass against such disseisor. And if the party grieved recover by assise, or by action of trespass, and it be found by verdict, or in other manner by due form in the law, that the party defendant entered with force into the lands and tenements, or them after his entry did hold with force, that the plaintiff shall recover his treble damages against the defendant; and, moreover, that he make fine and ransom to the king. And that mayors, justices, or justice of peace, sheriffs, and balliffs of cities, towns, and boroughs, having franchise, have in the said cities, towns, and boroughs, like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties and countries aforesaid have." But by s. 7, it is provided, "That they which keep their possessions with force in any lands and tene-

*Verdict for the plaintiffs, damages 106/.,† costs, 40s.‡ Scarlett, Brougham, Kee, and Evans, for the plaintiffs. The Attorney General, and Campbell, for the defendants.

[Attornice-Routledge, and Gordon.]

ments, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possession in the same by three years or more, be not endamaged by force of this statute."

Mr. Serjeant Hembius lays down, (Curw. Hawk. title Foreble Entries, p. 501.) that wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt, if they do not give way to him, his entry is forcible, whether he cause such a terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force. And the same circumstances of violence or terror, which will make an entry forforce. And the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also. (p. 502.)

thie, will make a detainer forcible also, (p. 50%) the verdict was entered for 100%, demages, and 40s. casts, on the first and second counts, and a sed. pres. entered as to the other counts; and in the record, the plaintiffs prayed that their damages should be awarded by the Court according to the statute; and the Court adjudged that they should recover treble their damages, being 300%, and 188% for their costs; which had been taxed by the master at the usual costs, plus half those costs, plus half these latter. These damages and costs we have been informed have been since paid.

costs, plas half these latter. These damages and costs we have been since paid.

In 2 Inst. 416, it is laid down, that in cases of re-dissessin and post-dissessin on the stat. of West. 2, c. 26, (which gives double damages,) the jury is to give the single, and the Court to double them. In Bumpeteed's case, Cro. Car. 448-9, the same is laid down as to treble damages, on the stat. of 28 Hes. 6, c. 10, (an act relating to the wages of knights of the shire;) and the case of O'Kelly v. Selter. Yelv. 176, goes to the same point.

I Where a statute gives double or treble damages, where damages were recoverable before the act, the plaintiff net only recovers double or treble damages, but his costs are doubled or trebled also; but where, by a statute, double or treble damages are directed, where so damages were before recoverable, then the plaintiff recovers no costs. 2 Inst. 299; and Wilhisses v. Albet, Cowp. 368; as in actions for forcible entry, the plaintiff recovers treble damages, and treble costs. 2 In actions for forcible entry, the plaintiff recovers treble damages, and treble costs. 2

number. 2 Inst. 284.

In actions for forcible entry, the plaintiff recovers treble damages, and treble costs. 2 Inst. 299; Robert Pilfler rase, 10 Co. 115 b.; Skin v. Atkinson, 1 Vent. 22. In Turner v. Galilies, Hard. 152, it is said, that in forcible entry the plaintiff gets no costs; but the authorities above sited are all directly the ather way. The costs de incremente are doubled or trabled as the case may be, as well as those found by the jury. Thereughgeed v. Scraggs, Cro. Eliz. 582; Smith, g. t. v. Dunes. 2 Str. 1948.

It should be observed, that in all cases where double costs are given, they are the taxed costs and half of them, and treble costs are the costs taxed, the half of them, and half of these latter. Hul. C. 484.

*COURT OF COMMON PLEAS.

SITTINGS IN LONDON, AFTER EASTER TERM, 1825.

BEFORE LORD CHIEF JUSTICE BEST.

HADWEN ». MENDISABAL.

If a party receive hills of exchange for goods sold, and pay them away, but afterwards got them back, and they are, at the time of the trial of an action of assumpts for the price of the goods, lying protested in the hands of his agent, he may recover the money due, without delivering up the bills, and the defendant must seek relief in equity, if they are not delivered up.

Assument for goods sold. A witness proved an admission of a balance due to the plaintiff for goods; but, from his cross-examination, it appeared that bills of exchange had been given for these goods, which bills had been paid away by the plaintiff, but had been subsequently got back by him, and were, at the time of the trial, lying protested in the hands of his agent at *Cadiz*.

Pell, and Taddy, Serjts., objected, that as the plaintiff had passed away the bills, he had made them his own, and could not recover for the goods sold

without delivering them up.

BEST, C. J. If the bills had gone from the plaintiff's control, the objection would be unanswerable. The plaintiff might have them here now, but you could not make him deliver them up till the payment of the money. If the bills are not forthcoming, you may have equitable, relief in another place. A man having a bill may declare for *goods sold, saying, I will not go on the [*21] bill. The verdict must be for the plaintiff.

Verdict for the plaintiff.

Vaughan, Serjt., and F. Pollock, for the plaintiff. Pell, and Taddy, Serjts., for the defendant.

[Attornies-Nettleship, and Freeman & H.]

In the ensuing Trinity Term, Pell, Serj., moved for a rule nisi for a new trial, and cited Dangerfield v. Wilby, 4 Esp. N. P. C. 159.†

But the Court said, there was no ground for the motion: GAZELEE, J. observing, You may at all times declare for the consideration of bills of exchange, and it is for the other party to show that there were bills given, and that they had been honored.

Rule refused.

† In that case it was ruled, that where a promissory note has been given for money due by the defendant to the plaintiff, who declares on it, with the money counts, he must prove the note lost, or destroyed, before he can have recourse to the money counts, if it appear that the money so claimed was that for which the note was given.

ADJOURNED SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1825.

THARPE, Esq., v. GISBURNE.

If a party has received letters from another, and has acted on them, it is sufficient to justify him in awearing as to his belief of the handwriting of such person.

Assumpsing for the keep of certain horses. The defendant's attorney was called to prove his signature to a paper: *he said he had never seen the defendant write, but that he believed this instrument to be of his handwriting from having received letters from him, upon which he had acted.

BEST, C. J. Held that this was quite sufficient for the witness to ground a belief upon, which was all that was required.

Verdict for the plaintiff.

Wilde, Serjt., and Chitty, for the plaintiff. Vaughan, Serjt., and Holt, for the defendant.

[Attornies—Bevan, and Spencer.]

In Phill. L. E. c. 8, s. 2, the learned author says, that if a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's handwriting; and the admissibility of the evidence must depend upon this, whether there is good reason to believe that the specimens, from which the witness has derived his knowledge, were written by the supposed writer of the paper in question; and cites the cases of Lord Fense v. Shirley, Fitzg. Rep. 195; Layer's case, 6 St. Tri. 275; and the case of the Seven Bishops, 4 St. Tri. 338; neither of which very explicitly decides this point; and in the latter case the judges were divided on it. But now the universal practice of the Lord Chief Justices at the Sittings is, if a witness states that he has received letters purporting to come from a party, and has acted on those letters, to ask him whether he believes the paper he is called to prove is of that party's handwriting.

HOULISTON v. SMYTH.

If a wife quits her husband's house, under a fair apprehension of personal violence, that is equivalent to her husband's turning her out of doors; and improper restraint of her person in a madhouse is, for this purpose, personal violence; and, therefore, a party supplying her with necessaries may recover for them against her husband. If she quits her husband's house because he brought a common woman to reside in it, that is also a sufficient reason for her going: and if the husband is sued for necessaries appropriate to her, it is no answer to the action that she had committed adultary previous

supplied to her, it is no answer to the action that she had committed adultery previous to the credit being given, if the husband did not know it till after the credit, nor that after the credit she obtained a decree for alimony, which alimony was to relate back to

a period before the credit.

If, to rebut the presumption that a wife left her husband's house from his cruel treatment of her, letters written by her to her husband in affectionate terms are offered in evidence, it must be proved at what time they were written, or they are not admissible in evidence, and the dates of them are not sufficient proof of the times at which they were written. The minute-book of the Consistorial Court is sufficient evidence of a decree for alimony pronounced in that court, without such decree being drawn up in form.

Assumpsit for the use and occupation by the defendant's wife, of certain rooms of the plaintiff, and for goods *furnished to her, and money lent.
Plea—General issue. The action was brought for board and lodging furnished to the defendant's wife. From the evidence adduced for the plaintiff it appeared that the defendant had been seen in a threatening attitude, holding his fist in his wife's face, and that he had directed a servant to follow her and watch her conduct; he having had her confined some time previously in a private madhouse, from which she had been discharged after an examination before two of the Judges. It was proved also that the defendant had said to her, if she did not mind what she was about she should have "Mad Moll" to attend her again. In consequence of these things, she left the defendant's house, and went to the plaintiff's, where she lived for some time, and for part of that time payment had been made by the defendant's attorney, he himself being absent in Scotland.

Vaughan, Serit., to rebut the charge of cruelty, produced evidence of acts, which, if true, undoubtedly showed insanity on the part of the lady. But the credit of the witnesses was in the course of the cause very materially shaken.

He also gave evidence of an act of adultery committed by Mrs. Smyth in the year previous to the time for which the plaintiff claimed; but it appeared that the defendant was not made acquainted with it till after all the credit had been given. Vaughan, Serjt., then proposed to give evidence of adultery committed in the month of December subsequent to the time of the credit.

BEST, C. J. I think, that being after the time of the giving of the credit, it is not evidence.

Vaughan, Serjt. I propose it with a view to show that the wife's continuing conduct is an excuse for the husband.

BEST, C. J. The receiving such evidence might give the husband, in some cases, the liberty to take advantage of *his own profligacy, as he might have driven her to such behavior by his own bad conduct.

Vaughan, Serjt., then tendered in evidence certain letters purporting to be written by Mrs. Smyth to her husband, to rebut the charge of cruelty. They had no post-mark.

Pell, Serjt., submitted that it must be proved when they were written.

Vaughan, Serjt. If there be a date, it is only necessary to prove the hand-

BEST, C. J. Generally speaking, that is correct. But where the letters of the wife are given in evidence in favor of the husband, you must prove when they were sent; because, after a reconciliation, husband and wife might contrive letters.

Pell, Serjt., cited Edwards v. Crock, 4 Esp. 39; Phil. L. E. 85.1

Vaughan, Serjt., and Manning. These letters are admissible without further proof, because they would be so in a suit instituted by the wife for alimony; and an action like this by a tradesman is subject to the same rules as such a suit.

*Best, C. J. I am clearly of opinion that they are not admissible.

The defendant's attorney then proved that the letters were put into his hands by the defendant, in October or November, 1823. They were dated in October in that were a limited to the letters were put into his hands by the defendant, in October or November, 1823. They were dated in October in that were a limited to the letters were put into his hands by the defendant, in October or November, 1823.

October in that year. They were read; and in one of them, after alluding to some application for money at the Treasury, Mrs. S. observes, that if it could not be obtained without their appearing to be on good terms, she should recommend Mr. S. to say that they were so, and she would confirm it if necessary.

Vaughan, Serjt., also called the registrar of the Consistory Court at Doctors' Commons, who produced the minute-book of that Court, containing the minutes of proceedings in that Court, commencing in the month of February, 1824; and also the minutes of a decree for alimony to Mrs. Smyth.

Maule, for the plaintiff, submitted, that minutes not reduced into a formal

shape, could not be received in evidence.

BEST, C. J., was of opinion that they could; and the witness being asked, said, that nothing more is done with these minutes, unless the alimony is not paid.

The decreeing part of the minutes was then read; it was dated in December, 1824, and decreed alimony at the rate of 301. per annum, to commence from the return of the citation, viz. the 8th of May, 1824.

Vaughan, for the defence, relied on the cases of Govier v. Hancock, 6 T.

[†] The case of Edwards v. Crock was an action for crim. con., and the plaintiff and his wife having lived as servants in different families, letters written by the wife to the husband before any suspicion of a criminal intercourse, were admitted as evidence of her affection towards her husband. And in the later case of Trelawney v. Coleman, 1 B. & A. 90, . was held, that letters written by the wife to the husband, and proved to have been written at the time they bere date, and long before she was suspected of adultery, were evidence of her affection towards her husband, although the cause of the husband and wife not then living in the same place was not shown.

R. 603; Nurse v. Craig, 2 N. R. 148, and Hortoood v. Heffer, 3 Taunt.

An endeavor was made to prove a notice to the plaintiff (after tho payment by the defendant's attorney before mentioned) not to trust Mrs.

Smyth any more, but this failed.

Pell, Serjt., in reply. If a husband by cruelty drives his wife from his house, a notice not to trust her is of no effect. Selwyn's L. N. P. 271. The letters put in were evidently written to serve the defendant. And the payment by the husband's attorney up to a certain time is evidence, which, if there be no notice not to trust, would be sufficient to decide the cause. But allowing that there was such notice, there is enough in this case to justify the wife's leaving her husband; *and therefore the plaintiff, who took her into his house, is entitled to recover in this action.

BEST, C. J. This is an action brought by the plaintiff, who is a lodging-house keeper, against the defendant, who has an office in the Exchequer, to recover a sum of money for board and lodging furnished to the defendant's wife. man in the plaintiff's situation cannot recover, unless the wife be at his house with the assent of the husband, or unless the husband drives her from her home by cruelty, personal violence, or that which shall excite reasonable fear of personal violence, for in such case he sends her out with a general credit. plaintiff puts his case on the grounds of both assent and cruelty. He says to the defendant, you have paid me to a certain time, and from that your assent may be presumed. If acts of personal violence had occurred immediately about the time of leaving, though not at the moment, that is ground for presuming that the leaving was on their account. It is proved, that a servant had directions to watch Mrs. Smyth and follow her about, and that Mr. Smyth shook his fist in her face, and told her, she should have mad Molly to attend her again. These things would give her reason to fear personal violence; and if so, she had a right to leave. I think that personal restraint includes personal violence. The payment made by the defendant's attorney, up to the 12th of May, allows that she was at the plaintiff's correctly up to that time. I entirely subscribe to the doctrine in the case of Govier v. Hancock. If a woman, though provoked by the bad conduct of her husband, actually commits adultery, he is not liable for her support; but that law does not apply to this case. The adultery proved here took place in the year 1823, (the credit beginning April, 1824,) but the adultery was not disclosed to the husband till the autumn of 1824, at which time no more credit was given by the plaintiff. This act of adultery in 1823, the husband not knowing it, but holding her out as fit to be maintained

† In the case of Govier v. Hancock, the defendant having brought another woman into bis house, turned his wife out of doors, the wife committed adultery, and after that the plaintiff trusted her for necessaries; the Court held that he could not recover.

In the case of Nurse v. Craig, the husband and wife having executed a deed of separation, by which the husband covenanted to pay a weekly sum to a trustee for her support, and failing to do so, the question was, whether the trustee could maintain an action of essumpsit for necessaries supplied to her: Heath, Rocke, and Chambre, Js., held that he might; Mansfield, C. J., contra.

In Herwood v. Heffer, which was an action for necessaries supplied to the defendant's wife, who had left her husband's house, the plaintiff relied on the fact of the husband having taken another woman into his house, with whom he cohabited, being a sufficient

ing taken another woman into his house, with whom he cohabited, being a sufficient reason for his wife's leaving it. On Best, Serjt., applying for a new trial, Lawrence, J., reason for his wife's leaving it. On Best, Serjt., applying for a new trial, Lawrence, J., said, "you did not state any apprehension of her personal safety, you principally dwelt on the circumstance of the defendant's having placed a profligate woman at the head of his table, and having told the wife, that if she did not like to dine there, she might dine in her own chamber. I thought that, however improper that conduct might be, and however abhorrent from the feelings of a delicate woman, she might nevertheless have had necessaries, if she had stayed there; she might, if she had thought fit, have sued for all mony, and a divorce a mensa et there." And Mansfeld, C. J., said, "If this suit were maintainable, it would be necessary that the jury should, in the first place, determine whether the wife lawfully left her home or not. This would wholly supersede the necessity of a suit for alimony, or a divorce a mensa et there. I think nothing short of actual terror and violence will support this action."

This case, it will be seen, is now over-ruled.

in 1824, *will not destroy the plaintiff's right to recover. There is no case to this effect. If a man, knowing of the commission of adultery by his wife, turns her out of his house, he gives her no credit; but not otherwise. As to the case of Horwood v. Heffer; in that case I moved for a rule to show cause why there should not be a new trial, and Mansfield, C. J., confirmed the ruling of Mr. J. Lawrence. I was dissatisfied with the decision at the time, and have continued so ever since; and if this case had come to that point, I had determined to have it reconsidered: my Lord Chief Justice Mansfield in that case said, you must go to Doctors' Commons; and I consider that to be wrong, because alimony might not be obtained in less than six months, and the party in the mean time might starve.

Verdict for the plaintiff.

Pell, Serit., and Maule, for the plaintiff. Vaughan, Serjt., and Manning, for the defendant.

[Attornies—Frowd & R., and Murray & Son.]

In the ensuing Trinity term, Vaughan, Serjt., moved for a new trial, on the ground of the misdirection of the Lord Chief Justice at the trial, contending that the evidence which had been given of adultery was sufficient to prevent the defendant's being liable; and also that the decree for alimony, though made subsequently to the expiration of the credit, yet having a reference back, would discharge the husband from the effect of any supposed credit; otherwise he would be paying double in respect of the same time.

PARK, J. Is the wife to starve while the Court is considering whether she

shall have alimony or not?

Vaughan, Serjt., then went on the ground that his *Lordship, in summing up, had put the case too broadly, when he said, that reasonable suspicion of violence was enough to justify a woman in quitting her husband's house. He cited Horwood v. Heffer as an authority in his favor.

BEST, C. J. Are you aware of a late case in which Lord Ellenborough, at N. P., expressly over-ruled Horwood v. Heffer, and nobody has questioned his decision. I allude to the case of Aldis v. Chapman, Selwyn's L. N. P.

281.†]

Vaughan, Serjt. If she fears confinement, she may apply for a habeas corpus, or may exhibit articles of the peace in case of violence. No case has gone so far as to say that reasonable suspicion is enough, and this would

give her an opportunity of going away under pretence of fear.

BEST, C. J. There is not the least pretence for disturbing the verdict; the only ground of misdirection is this, that I told the jury, that if Mrs. Smyth had reasonable ground to suspect personal violence, she had a right to absent herself from her husband's house, and the plaintiff had a right to recover. In the case of Horwood v. Heffer, Mr. Justice Lawrence observed to me, you did not rely on

† In that case it was ruled, that "where a husband, by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessaries, e.g.

medicines in sickness during the separation."

It should also be observed, that when a husband improperly turns his wife away, notice to a tradesman not to trust her with necessaries, is of no avail on his part, and in the case of Boulton v. Prentice, (Selw. L. N. P. 281,) it was resolved by the Court, that although the prohibition (from trusting her) continued in force during cohabitation, yet such prohi bition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away, and refused to maintain her.

any threats of personal violence. Where, therefore, threats *of personal violence are used, Mr. Justice Lawrence's authority is in my favor. A woman is not bound to wait till she is actually treated with cruelty; my brother Vaughan says, that if my doctrine is correct, a woman may leave under a pretence of fear, but it is not so; for the jury are to judge whether the circumstances justified her leaving or not. I said at Nisi Prius, that I should like to have Horwood v. Heffer over-ruled; since then Lord Ellenborough's opinion, in opposition to that case, has been shown me; and if I had known of that at the time, I would have ruled that Horwood v. Heffer was not law, it being against the first principles of morality. I was really shocked at the doctrines laid down in that case. Is a woman to remain within walls which contaminate her? If she did, undoubtedly, no Court would befriend her. She must show herself virtuous, she must separate herself pro salute animæ. But this case goes beyond that, for here there were threats of personal violence. I am of opinion, that there is no foundation for this application. With respect to the adultery, there is nothing in the objection. If a woman is caught in adultery, and turned out of doors in consequence, then no credit is given her; but where she leaves from fear of violence, and not on account of adultery, because the adultery was not known, and a credit is given by payment by the husband, and no notice not to trust, the case is altogether different. As to the alimony also, that is no answer to the action, for a woman might be starved while a suit for alimony is pending.

PARK, J. I am of the same opinion. There is no color for the interference of the Court. With respect to the decision in *Horwood v. Heffer*, I am surprised at the language of that case. Taken to its full extent, it is abhorrent to every feeling of a man, and every duty of a moralist and a Christian; for it is said, that although a husband places a profligate woman at the head of his table, and tells his wife that she may dine in her own room, yet she is not *justified in quitting his house, but should sue for alimony or a divorce a mensa et thoro. Is the mistress of a family to give way to a common prostitute? I have no difficulty in saying that that case cannot be the law of England, because it is not the law of morals and religion: I prefer the language of Lord Kenyon, who sayst that, where a wife's situation in her husband's house is rendered unsafe by his cruelty or ill treatment, it is equivalent to his turning her out of his house; and that the husband is liable for necessaries furnished to her under these circumstances.

BURROUGH, J. The only question is, whether Mrs. Smyth had reason to apprehend personal violence. There is express evidence of holding up the hand in a menacing attitude, and of a threat to send her to a madhouse. It appears that she had been improperly sent to one before; and that, in my opinion, was ground enough for the jury to find that she had reasonable cause for leaving her husband. It was a matter to be left to the jury, it was left to them in a proper manner, and they have returned a proper verdict.

GAZELEE, J. It is not necessary to ascertain what kind of violence is enough, in general; for it is impossible to doubt, that the threat of sending to a madhouse is quite sufficient. The jury have found that she had reasonable fear of this. It is not necessary particularly to enter into the case of Horwood v. Heffer, but I confess I am surprised at the doctrines it contains. I have always understood, that if a man by his conduct rendered his house unfit for a modest woman to remain in, she was entitled to leave it, and he thereby gave her a credit.

Rule refused.

† In the case of Hodges v. Hodges, 1 Esp. N. P. C. 441.

His lordship gave Wilde, Serjt., leave to move to enter a nonsuit, if the Cout should think that trespass would not lie.

Verdict for the plaintiff—Damages 51.

Pell, Serjt., and Abraham, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies—Brutton, and Donne.]

In the ensuing *Trinity* term, *Wilde*, Serjt., moved, pursuant to the leave given, to enter a nonsuit. He cited Comyn's Digest, tit. Esglise, G. 1; 2 Rolle, 337; *Corben's* case, 12 Co. Rep. 105; Godbolt, 200; Year Book, 9, H. 4, 14 b.† Comyn's Digest, tit. Action on the Case for a malicious misfeasance, A. 6; and Cro. Jac. 367.

BEST, C. J., mentioned Daltry v. Dee, 2 Rolle, 140.

Wilde, Serjt. That case is not law now. By the course of authority it has been overturned. The freehold of the church-yard is in the parson. The case in Cro. Jac. states that a tomb becomes part of the freehold in the church-yard. If the possession is in the parson, then on other person can maintain trespass. The declaration is, that the defendant seized, damaged, and destroyed certain tomb-stones, then and there being, and cut and defaced, &c. If that was one continuous act, then at no time did the possession revert to the party.

BEST, C. J. It appeared from the evidence, that the damage was done a

week after the carrying away.

Wilde, Serjt. But we never left the possession, so that it could not revert to the plaintiff. Suppose the act had been charged to have been feloniously done, if the taking down the tomb-stone was followed immediately by the carrying it away, the owner of the soil never would have possession of it as of a chattel; as if a tree were cut down and immediately carried away, that would not be larceny. Though the heir may have an action, yet it does not appear, that, if there be a removal, the property will revert to him. I apprehend it will continue in the parson. The action on the case is perfectly competent to redress injuries. And holding tomb-stones to be in the possession of the party who sets them up, will deprive the church-yard of much of its protection.

The Court took time to consider, and on the following day, their judgment

was delivered.

Best, C. J. We have considered the question in this case, and are of opinion, that trespass is the proper form of action. Buller, J., says, that for removing a person from a pew, trespass will not lie; but that is because pews are in the disposition of the ordinary, who may put in one person, and then remove him and put in another, for the convenience of the parish, unless there be a faculty. But there is a case in Rolle, which says, that if a pew be broken, trespass is the proper action. This case appears to me to be law: It has been doubted in one case, but is *supported by others, and is consistent with common sense. In the case in 9 Edw. 4, 14 b., the form of action turns out to have been trespass. That was Lady Wiche's case, which was trespass against the parson, and is cited by Lord Coke. On such a question one case is enough. My brother Wilde alluded yesterday to cases of felony, with respect to a tree severed and carried away by one continuous act. I think we ought

[†] This is the case of Lady Wiche; it is cited in 12 Co. Rep. 105, and in other places, as in 9 Hen. 4, but it is in the year book, 9 Edw. 4. 14 b. That was trespass against the parson, for removing Sir Hugh Wiche's, her husband's, coat, armer and pennen from the church. See also Co. Litt. 18 b., and Com. Dig. tit. Cemetery, (C.)

hardly to allude to criminal cases; because, in favorem vitæ decisions are often come to, which do not square well with the principles of the common law. If the contrary had not been settled law, I should have thought such a case a felony, because the moment a tree is cut down, it is a chattel belonging to the party owning the ground; and, when removed animo furandi, comes under the same principle as goods carried from one county into another. It is said, that trespass cannot be maintained, because the possession of the church-yard is in the parson. But the possession of the tomb-stone may be in another. If I grant land, reserving to myself the trees; if the tenant cuts them down, trespass will lie.

PARK, J. There is a case in which Lord Coke expressly says, that the possession of the tomb-stones is not in the parson, because he is paid for the permission to erect it.

GAZELEE, J. The case in Godbolt does not affect this case.

Rule refused.

*ADJOURNED SITTINGS IN LONDON, AFTER EASTER TERM, 1825.

PETTY et al. v. ANDERSON.

If husband and wife are living together, and business is carried on in the house in which they live, though the wife's name only appears in the purchase of goods, in the parish rates, and in a contract with the parish officers; yet the husband partaking of the profits of the trade, and being aware of and assenting to the dealings, is liable in an action for goods delivered at their house, for the purposes of this trade, though the bills of parcels are headed in the wife's name.

Assumpsit for goods sold. Plea—General issue. The plaintiffs were groters, and the defendant a baker and confectioner.

The plaintiffs' shopman proved that he had been on the premises where the goods were sent, and had seen the defendant there in a working dress, and applied to him for money; he said, that the witness had better speak to his wife; the wife said, she could not pay him then. The son afterwards brought the money. 'The name "Anderson" was over the door.

One of the plaintiffs' clerks proved that he had frequently called for sums due, and seen the defendant come out of the bakehouse with his coat off; who said that he was in the employ of his wife, but received no wages; that although he lived in the house, yet his wife and he did not cohabit; and that they had better not sue him, for if they did, they would not get more than 4s. in the pound.

Another witness proved that he applied for money at the shop, where he saw the defendant's wife, and she said, that she would tell Mr. Anderson.

On the part of the defendant, several bills of parcels were put in: they were in this form—

21 Augt. 1822. Mrs. Anderson,

Bought of Petty & Wood.

Witnesses were also called, from whose testimony it appeared that Mrs. 2 m 2

Anderson paid rent and rates, and that her name was in the rate books; that flour, and other articles had been furnished on her credit, by vanous *tradesmen, for which she paid, and that she had been employed to serve

the parish in which she lived with bread.

It appeared that the defendant had carried on the business of a baker in the same house, till he went to prison; that during his confinement the goods in the house had been sold under a distress for rent, and were purchased by a friend for Mrs. Anderson, who carried on business on the premises, as a baker and confectioner; that after the defendant's discharge under the insolvent act, he came again to the house, and lived there, all the family boarding and lodging together.

For the defendant the case of Arabella Beard, 2 Bos. & Puller, 93, was

cited.†

BEST, C. J., told the jury, that, in his opinion, the situation of the husband precluded the application of the law as to feme sole traders; and that although a married woman in London might carry on business for herself, yet, in this case, as the husband lived in the same house with his wife, and partook of the profits of the business, notwithstanding several invoices had been made to her, it must be taken that she was acting as his agent, and that the credit was in point of law given to him. His Lordship observed that the defendant's statement, that, by suing him, the plaintiff would only obtain 4s. in the pound, together with the other circumstances, showed his recognition of the dealings; and upon this directed the jury to find their verdict for the plaintiffs.

Verdict for the plaintiffs.

In the ensuing Trinity Term, Wilde, Serjt., obtained a rule nisi, for a new trial, on the ground that the Lord Chief Justice, instead of directing the jury to find their verdict *for the plaintiffs, ought to have left it to them to say to whom the credit was given: he cited the case of Bentley v. Griffin, 5 Taunt. 356.

The rule came on to be argued in the course of the same term, and Wilde, Serjt., was called on to support it. He argued, that, granting it to be a presumption of law that the credit was given to the husband, yet that there were circumstances to be left to the jury, for them to say, whether that presumption was not rebutted; such, for instance, as the payment of rates by the wife, the furnishing of goods by various tradesmen on her credit, and the bills of parcels of the plaintiffs made out in her name. It might be allowed that in cases of millinery furnished to a wife, bills of parcels, by the courtesy of trade, made out to her, furnished very little evidence; but here was the case of a wife notoriously trading on her own account, and supplying a parish with bread. As to the argument of collusion between her and her husband, what injury could there be, if the parties were cognizant of the facts? The wife was supported by friends, and therefore her credit was better than her husband's. He doubted whether, if the goods had been ordered for the husband, they would have been supplied. Were not these facts admissible to show that the plaintiffs, being cognizant of the circumstances, elected to trust the wife?

PARK, J. The granting of new trials, of late, has been too muth a matter of course. It appears that my Lord C. J. correctly stated the case to the jury, as well as expressed his opinion. In Cox v. Kitchin, 1 Bos. & Puller, 338, Buller, J., states, that motions for new trials are to depend on the discretion of

[†]In the case of Beard & Ux. v. Webb and another, 2 Bos. & Pul. 93, it was held, that a feme covert sole trader in the city of London, was not liable to be sued as such in the courts at Westminster.

the Court. Upon full consideration, in my humble judgment, this verdict is so right that no going down again could alter it; and I think, if a new trial were to be granted, and a different verdict returned, it would be the duty of this Court, at least for once, to see if it could stand. L. C. J. Holt, in the case of Langfort v. *The Administratrix of Tiler, Salkeld, 113, ruled that a husband was liable, as a matter of law, for goods furnished to his wife, on the mere ground of their cohabiting together.

BURROUGH and GAZELEE, Js., thought the case properly determined.

BEST, C. J. In Comyn's Digest, tit. Baron and Feme, (Q,) it is said, that if a wife buy necessary apparel, the assent of the husband is generally presumed. Here it could not be doubted; there was no fact which I could with propriety leave to the jury to repel that presumption. The invoices do not repel it, because the husband saw the goods, and assented to their being sent in, in that way. In the case of Bentley v. Griffin, it is true that the goods were furnished while the parties were living together, and the husband saw the wife wearing the clothes; but the contract was made privately, and the wife told the tradesman not to bring home the goods while her husband was there. In that case, therefore, there was a fact to be left to the jury. But, in the present case, can any thing repel the inference of the husband's assent, when every meal he eats, and the bed he sleeps upon every night, are furnished by the profits of the business?

Rule discharged.

Vaughan, Serjt., and Chitty, for the plaintiffs. Wilde, Serjt., and Bolland, for the defendant.

[Attornies-Amory & C., and Brooking.]

GIMSON v. WOODFULL.

If a party has good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, without he has done every thing in his power to bring the thief to justice.

TROVER for a mare. The mare was shown to be the property of the plaintiff; but in the course of the examination *of the plaintiff's witnesses, it
came out that the plaintiff had good reason to believe that the mare had
been stolen by the person who sold it to the defendant; and that steps had
been taken by him, both before a magistrate and otherwise, to get his property
back; but that he had done nothing towards bringing the thief to justice.

Onslow, Serjt., for the defendant, contended, that he was under no obligation to go into evidence for the defence. It was clear that the mare had been stolen. What occurred before the magistrate was done to see if restitution could be had, and not for the purpose of proceeding against any supposed offender. This plaintiff had done nothing to bring the thief to justice; and he could not merge the felony in the civil action. And he cited 2 Black. Com. 449; and 4 Black. Com. 362, and the case of Horwood v. Smith, 2 T. R. 750.

Vaughan, Serjt. The cases in Blackstone do not apply; they are merely as to how far property is affected by sale in market overt, and go on to state that, in the case of horses, inter alia, the party may have restitution before a

The property is in us. If a party state facts from which a ma gistrate may presume a felony, and the magistrate does not go on with the charge, it is enough. I allow that the objection would be good, if an action were brought against the felon himself.

A witness proved that he went with the plaintiff before Mr. Minshull at Bow Street, but as the examination there was taken down in writing, he was

not permitted to state what passed.

BEST, C. J. This is a hard case. I am of opinion that the plaintiff has done nothing that he ought, and I doubt if a statement of facts before a magistrate would be enough. But he goes to get back the property, and not *to prosecute the felon. If I was to hold that this action could be maintained under such circumstances, we should have no more criminal prosecutions. I take it, the law is this: you must do your duty to the public, before you seek a benefit to yourself; and then there is no necessity for a civil action. The decisions go not only to the case of an action against the felon, but as to actions against persons who derive their title under him. There is a case in the Term Reports, which says, that the property is in doubt till after prosecution. I cannot send this case to a jury; there being distinct evidence of felony, think that the case should have gone to the grand jury. The plaintiff must se called.

Nonsuit.

Vaughan, Serit., and Chitty, for the plaintiff. Onslow, Serit., for the defendant,

[Attornies—Hurst, and Watson & Son.]

At common law, a person robbed could only obtain the restitution of his goods by consicting the thief on an appeal of larceny, a proceeding long out of use, and now wholly abolished by stat. 59 Geo. 3, c. 46: but by the stat. 21 Hen. 8, c. 11, the judges are to grant writs of restitution, if the felon be convicted upon the evidence of the party robbed, or of other by his procurement; but the practice now is, if the stolen property be produced at the trial, for the judge to order it to be given up to the person from whom it was stolen; and my Lord Hale (1 Pl. 544) lays down, that the bona fide sale of the goods in market overt, does not operate against the party robbed; and if the thief has converted the stolen property into money, the Court before whom he is tried, will order that to be delivered up to the person robbed. Noy, 128, Harberry's case, cited Cro. Eliz. 661; and this is the universal practice. In the case of Horwood v. Smith. 2 T. R. 750, the Court held that one who had bona fide bought goods in market overt of the thief, but had fairly sold them again, before the conviction, was not liable to the owner in trover, though he sold them again, before the conviction, was not liable to the owner in trover, though he had notice from the owner not to part with them; but the Court appeared to be of opinion, that trover would have lain against him, if the stolen property had remained in his pos-

session up to the time of the conviction.

But in the case of Packet v. Patrick, 5 T. R. 175, it was *held, that the case of restitution of goods did not apply to goods obtained from the owner by false pretences, and without felony. For more on this subject, see 2 Curw. Hawk. tit. Appeal.

p. 240.

The foregoing, it should be observed, applies to all stolen goods when the felon is convicted; but as to stolen horses, it is enacted by stat. 37 Eliz. c. 12. § 4, that the owner may have restitution of them, if sold in market overt, by going through the forms there prescribed, within six months after they are stolen, and on payment to the purchaser of what they cost him, although the felon be not convicted.

COURT OF KING'S BENCH.

SITTINGS IN LONDON, AFTER TRINITY TERM, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

DIBDIN v. MORRIS.

A receipt given by the stage manager of a theatre "in satisfaction of all my claims for the last season," does not require the stamp of a receipt in full of all demands.

A receipt for 521. 10s. requires only a stamp for that amount, though it mentions 1001.

paid before.

Assumest for work and labor. The services performed by the plaintiff, for which the action was brought, were the writing of a piece called the Laplanders, and the acting as stage-manager of the Haymarket theatre. Evidence was given of the value of the services. For the defence, a receipt signed by the plaintiff was put in; it was for 52l. 10s., "being the amount of a benefit at the Haymarket theatre; which sum, together with 100l. already received, is in satisfaction of all my claims for the last season." This receipt was only on a 1s. 6d. stamp.

Brougham, for the plaintiff, contended, that the words "in satisfaction of all my claims," made it equivalent to a receipt in full of all demands; and that therefore the stamp was "wrong; or even if that were otherwise, it required at least a receipt stamp for 1521. 10s.

ABBOTT, C. J.—This is not a receipt in full of all demands. It is only a receipt for 521. 10s.; and though it mentions the previous receipt of the other sum, it is not at all given as a receipt for that sum.

Verdict for the defendant.

Brougham, and Evans, for the plaintiff. Scarlett, and Comyn, for the defendant.

[Attornies—Routledge, and Brooks & Co.]

FENTON, Gent., one, &c., v. CORREIA.

A charge for searching whether satisfaction of a judgment was entered, or whether an issue was entered, will not constitute an attorney's bill a taxable bill, so as to make it necessary to deliver it signed before action brought.

Assumpsir for work and labor by the plaintiff, an attorney, for business done before the commissioners for Spanish claims.

It appeared that the defendant employed the plaintiff to prepare and present memorials, and conduct his business before these commissioners; but the bill for this business was neither signed nor delivered a month before action brought.

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Scarlett, for the defendant, contended, that the plaintiff could not recover, because a signed bill was not delivered a month previously, the plaintiff's claim containing the following taxable items:

•	l.	s.	d.
1824. Aug. 18. Attending and searching at the judgment office, to see if satisfaction of judgment was entered, and paid 3s. 4d.	0	13	4
Sept. 9. Attending again to search whether the issue was entered in a case of Madras v. Willes, and could not find it, and	•	••	•
paid 1s. 6d. for search Sept. 9. Attending again to see if the issue was docketed in the	v	10	0
year 1819, and paid 1s. 6d. Sept. 13. Attending to search if the issue was docketed in 1817,	0	6	8
or 1818, and paid search 2s. 4d	0	6	8

*Now these being the regular charges of an attorney, they were taxable; for, although they were not for any step taken in a cause, yet they were for the business of an attorney respecting a cause then pending, and for which the plaintiff charges attorney's fees.

ABBOTT, C. J.—As at present advised, I think these are not taxable items, as any one may do this kind of business who is not an attorney: indeed, I

have no doubt about it.

Rotch, on the same side. I submit, that the fee paid for such a search is a disbursement at law, which would make the bill taxable as much or more than drawing an affidavit, which any one may do, who is not an attorney.

ABBOTT, C. J.—I think not.

Verdict for the plaintiff.

Gurney, and F. Pollock, for the plaintiff. Scarlett, and Rotch, for the defendant.

[Attornies-Fenton, and Taylor.]

BUCKINGHAM v. MURRAY.

In an action for a libel in a review, it is sufficient to set out the contents of an index, (referring to an article in the body of the review,) which is of itself a libel; and no reference need be made to the article itself, if the index contain, per se, prima facie libellous matter.

Acrion for a libel in the Quarterly Review. There was a count in the declaration setting out that part of the index of the review, which professed to relate to a work *published by the plaintiff, which was as follows: "Buckingham, J. S., Travels in Palestine, 394. Notice of an egregious blunder in the title page of this work, ib. Specimens of his ignorance and book-making, 377, &c., &c."

On the part of the defendant it was objected, that as the index was only a reference to the body of the work, it was not sufficient to state merely the contents of the index, but it was necessary that the count should contain a reference to the whole; otherwise that would appear to be unqualified, which was in fact subject to a material qualification.

ABBOTT, C. J. Suppose one part is stated which has a qualification, and there be another which has not, have you not a right to read that part which does

not contain the qualification? If one part of a book cannot be understood with out a reference to another, then you must set out both; but if it is intelligible without, then you need not. Suppose the matter referred to in the index had not been found in the volume. The index may contain a separate libel. I am of opinion there is no ground for the objection.

The defendant afterwards submitted to a verdict for 100%.

Scarlett, Brougham, and Hill, for the plaintiff.

The Attorney General, Gurney, and Park, for the defendant.

[Attornies-Vizard & B., and Turner & Sons.]

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*GRESLY et al. v. PRICE.

If it be necessary to prove a good petitioning creditor's debt on the 20th May, it is not sufficient to show that on the 29th of January previous, a sum of 7001, was due, and that there were receipts and payments afterwards; but it must be proved that on the specific day as much as 1001, was owing.

Assumptor by the assignees of a bankrupt. To prove that there was a good petitioning creditor's debt on the 20th May, the ledger of the debtor was produced. The witness who produced it did not make the entries in it himself, but stated that he saw several entries in it before the 20th May; but the latest he could speak positively to were of the date of the 29th January; at which time there appeared to be due to the petitioning creditor a sum of 7001. On his cross-examination he acknowledged that, subsequently to the 29th January, there had been receipts and payments; and he had no means of knowing, except from the books, in what way those receipts and payments altered the state of the account.

Scarlett, upon this, submitted that the plaintiff must be nonsuited, there not

being sufficient evidence of the petitioning creditor's debt.

Campbell. There is evidence to go to the jury, to show that, on the 20th May, there was due to the petitioning creditor 100l.; when on the 29th January so large a sum as 700l. was due. It is for the other side to cut down that sum, and reduce it below the sum required.

Scarlett. The evidence must be legal evidence; the plaintiffs undertake to prove that on a specific day a specific sum was due; and their giving evidence, which shows that it is uncertain whether it was so or not, certainly cannot be

sufficient.

ABBOTT, C. J. I think you have not gone far enough. You must prove a specific sum due on a specific day. After a period of nearly three months, there being continuing *transactions, how it is possible for any one to say, whether 1000l. or 5l. is due. You are to support your commission, and you have not done it. The plaintiff must be called.

Nonsuit.

Marryat, and Campbell, for the plaintiff. Scarlett, for the defendant.

[Attornies-Oliverson & Denby, and Pearson.]

ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1825.

GARDINER v. DAVIS.

If one allow another to trade in his own name, and as carrying on the business for himselt A payment to such person is a good bar to an action by the person so allowing him to trade; and for goods sold in the trade, the person so carrying it on may recover, unless the person for whom it is carried on assert his or her own right to the sum due.

Assumpsir for goods sold. The plaintiff was a cow-keeper, the defendant a milkman. The sale and delivery by the plaintiff to the defendant being proved; evidence was adduced on the part of the defendant, to show, that though the plaintiff ostensibly carried on the business of a cow-keeper, and had his name painted on the carts, his initials branded on the pails, &c. Yet that the business

ABBOTT, C. J. The question here is, more properly, With whom was this present contract made? than, To whom did the business belong? for if a person allow another to trade in his own name, and to hold himself out to the world as carrying on the business, a payment to that other would be a good bar to an action brought by the person for whom the trade was really carried on. And the *person ostensibly carrying on the trade, is by law entitled to recover for goods sold in the course of that trade, unless the person so suffering him to carry on the trade interfere, by asserting his or her right to the sum due. In this case, it appears that the defendant owes the money either to the plaintiff or to Mrs. Evans, and that the business was carried on by the plaintiff in his own name, and that Mrs. Evans has taken no step whatever to assert any right that she may have to this money; and, therefore, taking it that the plaintiff was carrying on the trade in his own name with her privity and consent, but was really a sort of agent to her, as she has not interfered to assert any claim to this money, he would still be entitled to recover in this action.

Verdict for the plaintiff—Damages 151. 6s. Brougham, and Abraham, for the plaintiff. Comyn, for the defendant.

[Attornies—Greenfield, and Ledwick.]

CHEMINANT v. THORNTON.

if ten sovereigns are offered to a person, and he is told that he may "take those ten sovereigns in full of his demand," that is not a good tender.

Semble, that a tender must be taken to be made on the behalf of the person who owes the money.

Assumpsit for the wharfage of timber. Pleas.—The general issue; and, secondly, a tender of 10l. Replication, denying the tender.

The evidence for the plaintiff did not make out the defendant to be the owner of the timber, and therefore did not affect him at all.

For the defendant, in support of the plea of tender, a witness was called, who proved that some persons called on the plaintiff, and tendered him ten sovereigns "for the timber that was on his wharf," and that he might take those ten sovereigns "in full of his demand." The witness stated, that those persons did not mention the name *of the defendant, nor did this witness sons and not more to be his.

Campbell, and Chitty, for the plaintiff, contended, first, that the tender not being shown to be made on the behalf of the defendant, was not good; that a stranger's going and making a tender would not avail; and secondly, that the tender was also bad, as the money was offered in full of the demand.

ABBOTT, C. J. Perhaps a tender must be taken to be made on the behalf of the person who owes the money; but this tender was not good, being made

in full of the demand.

Verdict for the plaintiff on the plea of tender, with 1s. damages. Campbell, and Chitty, for the plaintiff. Marryat, and Comyn, for the defendant.

[Attornies-Hutchison, and Sherwood & Son.]

PEACOCK, Gent., one, &c., v. DICKERSON, et al.

Tender.—If a person put down a sum of money, and the plaintiff offer to take it in part, and the defendant will not allow him to do so, saying that no more is owing: this is not a good tender; because a person tendering money, should tender it without making any terms, and leaving it open for one party to say that more was due, and to the other, that the sum tendered was sufficient.

Assumest for an attorney's bill, Pleas-General issue, and a tender of 31. 3s. 8d. The proofs of business done, and delivery of a bill, &c., were adduced on the part of the plaintiff.

To prove the tender, a witness was called, who stated, that he saw one of the defendants offer the plaintiff 31. 3s. 8d. in cash, and that the plaintiff was willing to take it in part; but the defendant said, that she owed him no more, and took up the money again, and

would not let the plaintiff take it in part.

Absort, C. J. This tender is not good. A party tendering money should tender it without making any terms, and should leave it still open to the one party to say that more was due. And to the other, that the sum tendered was sufficient.

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Verdict for the defendants on the general issue, and for *the plaintiff with

1s. damages on the plea of tender.

Scarlett, and D. F. Jones, for the plaintiff.

Sterks, for the defendant.

[Attornies—Robinson, and Smith & S.]

This case was tried at the Adjourned Sittings at Westminster, after Trinity term, 1825: but being on the same subject as the case of Cheminant v. Thornton, it was deemed more convenient to insert it in the shape of a note to that case.

BRAIN v. HARDEN, et al.

If trover is brought, and the intended defence is, that the defendant was the consignor of the goods, and had a right to stop them in transits, and the plaintiff, in anticipation of this, set up that he bone fide bought the goods of such consignor before the stoppage in transitu.

If it appear that that purchase by the plaintiff was by a written agreement, such agreement must be produced; and if it is not, the plaintiff will not be allowed to give other evidence of his buying the goods.

TROVER for twenty puncheons of brandy. The brandy was in the London Docks, and the London Dock Company, finding both these parties claim the brandy, filed a bill of interpleader it and this action *was therefore brought, under an order from the Court of Chancery. The defendants were the agents of Messrs. Elize & Co. of Cogniac; of whom Messrs. Matson & Co. of London, had ordered the brandy; but before the brandy had arrived in this country, Messrs. Matson failed, and the defendants directed the London Dock Company not to deliver it; as they, as the agents of Messrs. Elize, claimed the right of stopping it in transitu.

In anticipation of this defence, the plaintiff's counsel relied on an alleged bona fide sale of the brandy to him by Messrs. Matson, just before their failure. And to substantiate this, they called Mr. Matson, who stated, that their house (which stopped payment on the 21st of February, 1824,) sold the brandy to the plaintiff, and received a bill of exchange in payment. In his cross-examination, he said, that there was a written contract for this sale be-

tween their house and the plaintiff.

The Attorney-General objected, that as there was a written contract for the sale, and for the payment of the price, that written contract must be produced;

and if it was not, no other evidence could be given of the sale.

Scarlett, contra. If this was an action brought on the contract against either of the contracting parties, we must produce the contract; but this being an action of trover against a wrong doer, we need only prove that we bought the brandy, and that it is ours, which we may do without putting in the contract for the purchase of it.

ABBOTT, C. J. The defendants rely on a right to stop *in transitu; and, to get rid of that, the plaintiff contends, that he had previously bought the brandy of Messrs. Matson. Now, unless the written contract is put in, you cannot show a bona fide sale of it, from them to your client.

† On the subject of bills of interpleader, Lord Redesdale, lays down (Mitf. Treat. on Equity Plead. 47) that "where two or more persons claim the same thing by different or separate interests, and another not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, and fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. In this bill he must state his own rights, and their several claims, and pray that they may interplead, so that the Court may adjudge to whom the things belong, and he may be indemnified. If any the Court may adjudge to whom the things belong, and he may be indemnified. It any suits at law are brought against him, he may also pray that the claimants may be restrained from proceeding, till the right is determined. Prac. Reg. 3.—To a bill of interpleader the plaintiff must annex an affidavit, that there is no collusion between him and any of the parties; and if any money is due from him, he must pay it into Court, or at collusion with any of the parties, is a ground of demurrer to the bill. Mitf. 126. The plaintiff by his bill of interpleader, admits a title against himself in all the defendants. I Ves. & B. 334. If one of the claimants professes to have a legal and the other rangeling the interpleader, and that table title in the thing in question, it is sufficient to ground a bill of interpleader, and that though the plaintiff has not been actually sued by either, but only the claims made. Morgan v. Marsack, 2 Mer. 107, and the cases there cited. At the hearing of a bill of interpleader, the Court will either decide between the defendants, or direct an issue, an action, or a reference to the master, as the nature of the case may require.

Angel v. Hadden, 16 Ves 202; and when the right is decided, the Court will decree the defendant, who was in the wrong, to pay the costs of the plaintiff, and of the other defendants. Derries and
- Hardcastle and others, 2 Cox. 278.

The written contract was put in, and the case went to the jury on the quesson, whether there was a bona fide sale of the brandy by Messrs. Matson to the plaintiff, before the stoppage in transitu by the defendants.

The jury being of opinion that there was not, found a

Verdict for the defendants.

Scarlett, Denman, and Tindal, for the plaintiff.

The Avorney-General, and F. Pollock, for the defendants.

[Attornies-A. Mitchell, and Pearce.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Scarlett moved to set aside the verdict, on the ground that it was against evidence.

The Court were clearly of opinion that the verdict was quite supported by the evidence; but to give the plaintiff an opportunity of bringing the case before another jury upon any better evidence he might be able to produce, their Lordships granted a rule to show cause why, instead of a verdict for the defendants, a nonsuit should not be entered.

*STRONG et al. v. HART et al.

If in a case where (there being no charter party.) the captain of a ship deliver the cargo, and, as the best thing he can do for all parties under the existing circumstances, takes a bill of the agent of the persons to whom the cargo on board belongs for the amount of the freight: this does not discharge the owners of the cargo, but they are liable for freight if the bill be dishonored. But if it appear that he might have had his money of the agent, and chose to take the bill, it is otherwise.

Assumpsit for freight. The plaintiffs were the owners of the brig Atlantic, and the defendants were Messrs. Hart & Co., and Messrs. Hunter & Co.; each of which firms carried on business at St. John's, Newfoundland.

In the month of April, 1821, Messrs. Hart & Co., and Messrs. Hunter & Co., shipped codfish on board the Atlantic: 1800 quintals belonging to Messrs. Hart & Co., and 1400 to Messrs. Hunter & Co.; for which the captain, (who was one of the plaintiffs) signed separate bills of lading. All the fish were consigned to Messrs. Page & Noble, of Oporto. On the 28th of April, the captain received the following letter, signed by one of the firm of Hart & Co., and one of the firm of Hunter & Co.

"St. John, Newfoundland, 28th April, 1821.

"Captain James Allen, Brig Atlantic.

"Sir,—Having jointly laden your brig with a cargo of merchantable codfish, we request you will embrace the first favorable wind that offers, and proceed directly for *Oporto*; and on your arrival off that bar, we beg you will endeavor to communicate with our friends Messrs. *Page & Noble*, to whom your cargo is consigned, and whose instructions you are to follow as to your further proceeding with our fish. Should you discharge at Oporto, which we think very probable, our friends there will pay your freight according to bills of lading; and if ordered to a second port, the customary advance of 3d. per quintal will be allowed. We entreat your best exertions, &c., and remain &c.

Hart, Robinson & Co.

Hunter & Co."

The brig sailed and arrived at Oporto, and the captain was told by Page & Noble to go on to Bilboa, and place his cargo *in the hands of Messrs. [*56 Acha, Basozabal & Co. The captain accordingly did so, and delivered his cargo to them on the 14th of June; they at his request paid for him a part of the port charges, &c., and paid him a small sum in cash, and gave him a bill of exchange for 464l. 6s. 3d., the residue of the freight. This bill was drawn at 90 days after date on a person named Ugarte, who resided in London. This bill was dishonored, and Messrs. Acha & Co. stopped payment in the month of August.

Scarlett, for the defendants Hunter & Co., contended, that Messrs. Hunter & Co. and Messrs. Hart & Co., could not be jointly liable in this action, because each shipped a separate quantity of their own fish, and it was not a joint shipment by both. And even if it was so, the captain has a lien on the cargo for his freight, and he may refuse to deliver it, till his freight is paid. The defendants shipped their goods to Messrs. Page & Noble, knowing nothing of the house of Acha, Basozabal & Co., to whom the ship was sent by Page & Noble. When the ship arrived at Bilboa, the captain might have had his freight in specie. He is one of the plaintiffs, and he preferred making Messrs. Acha, Basozabal & Co. his agents, for he employed them to pay the port charges; and for the residue of the freight, he, for his own convenience, took a bill, when he might have had cash: now he cannot say that he will take a To entitle the plainbill for his own convenience, and yet hold others liable. tiffs to recover it, it ought to have been proved, that Acha, Basozabal & Co. got possession of the cargo by fraud, and that then the only thing the captain could do was to get this bill. By the bills of lading, which constitute the contract, the goods were to be delivered to Page & Noble, or their assigns, they paying freight. Why did not the captain make them do so? The question is this-Was this bill of exchange forced on the captain, or did he take it for his own convenience? for if he chose to take a bill of persons who were no parties to the contract, *he does so at his own risk, and we are not [*57]

answerable for it.

Marryat, for Hart & Co., waived all objections to the form of the action, and stated that there was no case to be found like the present, where there was

not a charter party.

ABBOTT, C. J. As to the first point, that this was not a joint contract by these two firms. If the case had depended on the bills of lading, it might not have been so; but then the ship would not have gone farther than Oporlo; but the letter of the 28th of April, goes to make all the defendants partners in this transaction, as both the houses, Hart & Co., and Hunter & Co., jointly direct the captain to follow the instructions of Page & Noble. As to the other point, the master may retain the goods, till he is paid his freight, but the custom is to deliver the goods and then to be paid the freight. The strong presumption in this case is, that the captain delivered the cargo, and finding that he could not get his money, he took a bill as the best thing he could do for all parties. If it had appeared that he might have had his money, but chose to have a bill, that would be a defence; but that is certainly not made out. If this was a joint contract, and if the captain took this bill as the best thing he could do under the circumstances, the plaintiffs are entitled to recover.

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BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Scarlet, on the behalf of Messrs. Hunter & Co., applied for a new trial, on payment of costs: he moved entirely on affidavits, showing that Messrs. Hart & Co., and Messrs. *Hunter & Co., had not jointly shipped the cargo.

The Court granted a rule to show cause.

The Attorney General, Peake, Serjt., and Campbell, for the plaintiffs.

Scarlett, and Brodrick, for the defendants, Hunter & Co.

Marryat, and F. Pollock, for the defendants, Hart & Co.

[Attornies—Holme, F. & L., for the plaintiffs; Macdougal & Co., for Hunter & Co.; and R. S. Wadeson, for Hart & Co.]

In the case of Tapley v. Marteus, 8 T. R. 451, which was an action on a charter party, it was held that the captain taking for his freight a bill of the consignees of the cargo, who was the consignor's agent, and which was disbonored, did not take away his right of action for the freight against the defendant who shipped the goods; but Lord Kenyon said, that if the consignee had been ready to pay in money, and the plaintiff had taken the bill for his own accommodation, there might have been some weight in the arguments used for the defence. The case of Christy v. Row, 1 Taunt. 300, was also an action on a charter party; it was there held, that if the captain sign a bill of lading, and it is stated, that the freight is to be paid by the consignees on the delivery of the cargo, he does not by that give up his claim on the consignor for the freight. And in Shepard v. De Bersales, 13 Ea. 565, on that point Lord Ellenborough says, that if the clause in the bill of lading, that the consignee should pay the freight, were introduced with a view to the consignor's security, and made it incumbent on the master of the ship, at his peril, to look to the consignee under the bill of lading for payment of the freight; the plaintiff had no right to deliver to the defendant's agent without first receiving such payment, and his delivery without payment was in that case not a right and true delivery; but if this clause were introduced for the master's benefit only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad before he should make delivery of the goods, he had a right to waive the benefit of that provision in his favor, and to deliver without first receiving payment: and he is not precluded by such delivery from afterwards maintaining an action. And the latter seems the true construction of this contract.

*ROBINSON, Clerk, v. WARD, Gent., one &c.

If an attorney has the money of a client in his hands, and pays such money to the credit of his own private account at his banker's, and that banker fail, he will be liable for the amount to the client, although he does so bona fide, and have a large sum of money of his own at that banker's.

His proper mode would be to open a new account with a banker, and to pay it in, in his own name, but 'to the credit of A. B.'s estate.'

Assumpsit. The declaration contained a special count, which stated, that in consideration that the plaintiff would retain the defendant as his attorney, &c., he would use due care, diligence, &c.; and proceeded to state that not regarding, &c. he did not place a sum of 5200l. in the funds, as was his duty, whereby the same was lost. There were also the common money counts. Plea—General issue.

The case was tried almost entirely on admissions: and on the part of the plaintiff the following facts appeared—The plaintiff had sold an estate in *Hamp-shire* to Mr. Alexander Baring; for which the defendant, as the then solicitor for the plaintiff, had received 5300l. on the 21st of August, 1824; and out of

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this sum the defendant was to pay certain charges incidental to the sale of the estate; and to place the residue in the funds. The amount of the charges to be paid by the defendant out of this sum of money was not ascertained till the 10th of September, though, as early as the 28th of August, they were known not to exceed 100l. The defendant had previously to the 10th of September paid the identical notes he received, as the purchase money of this estate, to the credit of his private account, at his banker's, Messrs. Marsh & Co. of Berner Street. The 18th of September was on a Friday. The bank of Messrs. Marsh & Co. paid during the whole of Saturday the 11th, but never paid after that. It was also proved that Messrs. Houre & Co. were the plaintiff's bankers, and that the defendant knew this.

For the defendant it appeared, that he had for some time kept this money in his own house; but that, being unwell, he went out of London, leaving only two female servants in his house; and that previous to his departure from London, he paid this sum of money into the hands of his bankers; with whom he had, at the time of *their failure, a further sum of about 1800l. of his own money. It was proved that Saturday is not a transfer day at the Bank; but that stock may be transferred on that day, on payment of half a crown extra-

Scarlett, for the defendant, argued, that the defendant was not bound to take more care of this money, than of his own. If he had locked up the money in his chamber, together with his own, and it had been stolen, the defendant clearly would not have been answerable; now, instead of thia, he placed it at banker's, which was considered a much safer place for large sums of money. If the defendant had kept the money for his own purposes, the case would have been different; but he lost his own money in the same way, and he cannot be more answerable in this case, than if he had locked it up in his own chambers: and the reason why the defendant did not pay the money into the hands of Messrs. Hoare, to the credit of the plaintiff's account, was, that he could not then have drawn it out, to invest it in the funds without the delay of obtaining a check for that purpose, from the plaintiff, who was in the country. And he cited Knight v. Earl of Plymouth, 3 Atk. 480, and Rowth v. Howell, 3 Ves. 565.

ABBOTT, C. J., (stopping the Attorney General in reply.) There are three modes which a person may adopt, when the money of others is placed in his The first is, for him to keep it in his own house; what the consequences of that mode are, it is unnecessary for me at present to state. Another mode is, for the party to pay it into his banker's, on his general account; but the third, and the correct mode is, for the party to open a new account in his own name for this particular purpose. The defendant should have paid this money into a banker's hands, by opening a new account in his own name, "for the credit of Robinson's estate," and so to ear-mark the money, as belonging to that estate: then it would have been kept separate. But if the *person having the money mixes it with his own, he thereby makes himself personally debtor to the estate. Here the defendant has mixed this money with his own, by paying it to the credit of his private account at his banker's; and he is therefore liable in this action, This is a very hard case, and all suspicion against the defendant is quite out of the question; but one of two innocent parties must lose the money, and, under the circumstances of this case, I think, that the plaintiff is entitled to a verdict.

Verdict for the plaintiff. Damages, 51361. 6s. 3d. The Attorney General, Bolland, and Law, for the plaintiff. Scarlett, and Comyn, for the defendant.

[Attornies-Parnther, and Turner & Ward.]

In the case of Knight v. Lord Plymouth, 2 Atk. 480, a receiver under the Court of Chancery, having a large sum to remit to London, for safety paid it to a tradesman, and

took his bills on London for the amount; the tradesman failed. Lord Hardwicke considered the getting these bills to remit, to be a measure of necessary precaution: and held the receiver not answerable; but said, that if he had placed the money in what he knew to be improper hands, he should consider him answerable.

to be improper hands, he should consider him answerable.

Rowth v. Howell, 3 Ves. 565, was the case of an executor, who paid securities for money into the hands of the person who had been the banker of his testator, whereby they were

lost; and the executor was held not answerable.

*62] *ADJOURNED SITTINGS AT WESTMINSTER, AFTER TRINITY TERM, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

DEAN v. BROWN, Esq. et al.

If a feme sele is carrying on a trade, and before her marriage, conveys her 'stock in trade, furniture and other articles, belonging to her, in and about her said business,' to a trustee, for her separate use, and then marries; such property is not liable to be taken in execution for the debts of her husband, though some of the articles have been disposed of, and others purchased for her use in their stead.

TROVER for a horse and chaise. The defendants were the sheriff of Middlesex, and one of his officers. The sheriff had taken the horse and chaise under a writ of fieri facias which had issued against the goods of a person named Hall.

For the plaintiff it appeared, that Hall had married Miss Tyler, who was an artificial florist; and that previous to their marriage a deed of settlement, dated the 24th of January, 1824, was executed between Hall, Miss Tyler and the plaintiff, (together with another person since deceased;) by this settlement, after reciting that a marriage was about to be had between Hall and Miss Tyler, and that she had carried on the business of a plumassiere and artificial florist, and had stock in trade and other property, it was agreed, with the consent of the intended husband, that the plaintiff (and the deceased trustee) should hold to and for the sole and separate use of Miss Tyler, after her intended marriage, "all her household furniture and other effects" specified in a schedule, (in which schedule neither the horse nor chaise were inserted) "and all her stock in trade, materials and other articles now belonging to her in and about her said business."

Miss Tyler married Hall, and still continues to carry on the business of an artificial florist; she had the horse in question before her marriage, and also a chaise, which was sold subsequent to the marriage, and the chaise in question bought in its stead; which latter was used as the former had been, about her business, she being very lame. Notice was given by the plaintiff to the sheriff that the horse and chaise belonged to him under the settlement, the terms of which were briefly stated in the notice.

The defendants relied on the circumstance of the horse and chaise not being included by name in the schedule to the settlement, and on the fact of *Hall* baring used the chaise when his wife was not with him, and of his having

had the horse to draw a cart employed by him in his business as a conchandler.

Abborr, C. J. The question in this case is, not whether this horse and chaise are the property of Hall or of his wife; because, by the law of this country, a married woman can have no property distinct from her husband, and by her marriage all property that she had before belongs to him, and is liable to his debts, but in another mode the property of even moveable articles may be secured to a wife, by her, previously to her marriage, conveying such property to trustees, for them to hold it to her sole and separate use. In this way, though a wife herself can by law have no separate property, yet the trustees may hold it for her, so that it shall not be subject to the control of her husband, nor liable to his debts. With regard to real estates, this was done many, very many years ago, and in more modern times personal property has often been so secured. The question here is, whether this property is by the settlement vested in the plaintiff: by the settlement all her furniture and effects mentioned in the schedule are conveyed to him. These words are large enough to have passed the property in the horse and chaise to the plaintiff, if they had been named in the schedule, but they are not, and therefore, as far as that part of the settlement goes, the property in them would pass to the husband on the marriage; but the parties by the settlement proceed to convey w the plaintiff all the stock in trade, materials, and articles belonging to her in and about her said business. The question therefore is, whether this horse and chaise *were necessary to her in and about her business. She, it appears, was lame, and that would make it convenient to her to use a chaise; but, indeed, a chaise might be useful to a physician or a lawyer, without being necessary for either. It is pretty clear that the horse was hers, and that she bought the chaise; and if they are articles necessary to her in and about her trade, the property in them is by the settlement vested in the plaintiff, as her trustee; but if they are not, they become the property of the husband on the marriage.

The jury thought them necessary; and found a verdict for the plaintiff.

His Lordship gave the defendant's counsel leave to move to enter a nonsuit, if the Court should be of opinion that there was no case to go to the jury, on the ground that these articles could not be included under the words of the settlement.

Scurlett, and Comyn, for the plaintiff. Gurney, and Holt, for the defendants.

[Attornies—Grimaldi & S., and Smith & B.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Gurney, moved for leave to enter a nonsuit, or for a new trial, on the ground that the horse and chaise could not be included within the terms of the deed, for that they were not necessary to the trade of Miss Tyler; or that, if they could be taken to be within the terms of the deed, the verdict was against evidence.

ABBOTT, C. J. It occurred to me at the trial, that the *question whether the horse and chaise were within the words of the deed, was a point of [*65]

law, but as the case was not put on that, I left it to the jury, but reserved the point, as the Court might consider it a mere question of construction of a deed.

The Court granted a rule to show cause.

See the cases of Cadogan v. Kennett, Cowp. 432; Jarman v. Woolston, 3 T. R. 618; Haslinton v. Gill, 3 T. R. 620, n.

MARTINEAU et al. v. WOODLAND.

If goods were sold on commission by the defendant abroad, on an action for not accounting, the defendant's agent in London is a competent witness for the plaintiff, though he has accepted a bill for the price of them, which is lying dishonored in the hands of the plaintiffs.

Assumestr for not accounting for the price of certain bombazeens and crapes

sold by the defendant for the plaintiffs, on commission.

The plaintiffs were manufacturers of crape at *Norwich*, and the defendant (and his partner who had been outlawed) carried on business at *Calcutta*. The goods had been sent to them to sell on commission, and they had sold them.

To prove this, the defendant's agent in London was called: he stated that he had accepted a bill for the sum for which the action was brought, which

bill had been dishonored, and was in the hands of the plaintiffs.

Marryat objected that he was not a competent witness, as, having accepted a bill for the sum in question, it was his interest to fix the defendant in this action; for if he paid the plaintiffs, the witness would be exonerated on the bill.

Scarlett, contra. He is indifferent, his interest being equal each way, for if he is obliged to pay the bill, he will recover the amount of the defendant, and if he makes the *defendant pay in this action, the witness does not pay any thing.

ABBOTT, C. J. I think he is a competent witness.

Verdict for the plaintiff.

Scarlett, and Jardine, for the plaintiffs. Marryat, for the defendant.

[Attornies-Martineau & M., and Kearsey & S.]

PRINCE et al. v. LEWIS.

The owner of a market can maintain no action against a person selling in the street near his market, if he allows the area of his market to be partly used for purposes unconnected with the market, although there may be sufficient room left in the market, especially if no notice was given to the defendants that there was room for him to sell in the market.

ACTION on the case. The declaration stated that the plaintiffs were possessed of a certain close, called Convent Garden Market, situate, &c., and to a certain market holden and to be holden there on every day in the week

throughout the year, Sundays and the feast-day of the birth of our Lord Christ excepted; for the buying and selling of all and all manner of fruit, flowers vegetables, roots and herbs whatsoever, together with the toll, stallage, &c., to such market appertaining; whereby divers great gains, &c., accrued, and ought still of right to accrue to the plaintiffs; yet the defendant, well knowing, &c., and fraudulently intending, &c., on the 4th day of January, 1825, and on divers other days, &c., being all other days than a Sunday, or Sundays, or the feast-day, &c., and being respectively days on which the said market was held at, &c., in a certain public highway there near to the said market, and within seventy-two yards of the said market, wrongfully, &c., and without the license of the plaintiffs, and against the will of the plaintiffs, exposed to public sale, and sold to divers persons divers large quantities of vegetables, &c., and the said persons who so bought the said vegetables, &c., and who would have otherwise resorted to the said market, were induced to resort to the *said highway, and there buy these vegetables, &c., so exposed to sale in the said highway, to the damage of the plaintiffs, and to the injury of the said market, by means of which, &c., the plaintiffs were disturbed and annoyed, in the exercise, &c., of the said market, and were deprived, &c., of divers large sums, &c., which would have accrued, &c. Plea-General issue.

It appeared that the plaintiffs were the lessees of Covent Garden Market, under the Duke of Bedford. The market was granted to William Duke of Bedford, in the Reign of King Charles the Second, by letters patent, for the buying and selling "of all and all kinds of fruits, flowers, roots and herbs whatsoever, together with all liberties, free customs, tolls, stallage, piccage, and all other profits, advantages and emoluments whatsoever to the like market in any wise belonging or appertaining." This grant was recited in a private act of Parliament, 53 Geo. 3, c. 71, entitled an act for regulating Covent Garden Market, and this act made the accustomed toll payable by the seller of fruit, &c., in this market; and it was proved that the defendant, who occupied a house in James Street, on the 4th of January, 1825, placed a wagon before his door, and within about seventy yards of the market, and there sold greens: he was asked for the toll, but refused to pay it. It was proved that there was at this time sufficient room left in the market for him to have gone there, if he had chosen; but upon the cross examination of the plaintiffs' toll collector, it appeared that, in the area of the market, there were several persons who rented stands by the year, and also three shops for the sale of china, and also some other buildings. It did not appear, that the defendant was requested to go into the market, or that he was told there was sufficient room there.

Abbott, C. J., on this evidence ruled, that the owner of a market could bring no action against those who sell near it, unless such owner devotes the whole of his market to "the purposes for which it was granted, and that the plaintiffs having allowed shops to be in the area of this market, were

not entitled to recover. His Lordship, therefore directed a

Nonsuit.

Gurney, and Hutchinson, for the plaintiff. Scarlett, Marryal, and Comyn, for the defendant.

[Attornies-Phillips and Rogers & Son.]

BEFORE ABBOTT, C. J., BAYLEY HOLROYD, AND LITTLEDALE, 18.

In Banc.

Gurney moved for a new trial in this case, and argued that the owner of a market did not lose his remedy against persons selling articles near it, by the mere fact of there being buildings in it, provided that sufficient room were left in the market; if the market were full, it would be otherwise; but if a person could have access to a market, and could have a stall there, he was not at liberty to sell on the outside.

BATLEY, J. Had the defendant notice that there was room in the market? ABBOTT, C. J. He had not, and that circumstance had great weight in my

mind.

BAYLEY, J. This is a vegetable market, and my doubt is, whether the public have not a right to the whole of it for that purpose.

Gurney. The defendant was bound to go to the market as long as there

was room.

Abborr, C. J. In that I quite agree with you, provided that your market

were entirely open.

*69] *Gurney. The defendant must have known that there was room; and besides, he never asked for a stall nor complained that the market was occupied in an improper way.

The Court granted a rule to show cause.

In the case of Blakey v. Dinsdale, Cowp. 664, Lord Mansfield lays down, that if corn is bought and sold just outside the market, in fraud of the tell, the owner of the market cannot distrain for toll, but must bring an action on the case. And in the case of Mosely v. Pierson, 4 T. R. 104, and The Bailiffs, &c., of Tewkesbury v. Bricknell, 2 Taunt. 120, it was held, that if parties did not bring their goods into the market, but sold them by sample, an action on the case would lie against them for such injury to the market. And in the recent case of Wells v. Miles, 4 B. & A. 559, it was laid down, in confirmation of former authorities, that toll could only be taken in respect of things actually brought into the market, and there sold. In this last case, the law was very fully gone into by the counsel and the Court.

DREW, et al., Gent., three, &c., v. CLIFFORD.

In an attornies bill, it is not sufficient to charge the costs of an action brought for the new defendant by the plaintiffs attornies, at one sum in the lump, although the costs in that action had been taxed at that sum as between party and party.

Assumptit for an attornies bill. Plea—General issue. A bill, signed by the plaintiffs, had been duly delivered; it was for business done in the Insolvent Debtors' Court, and on a writ of error, (as to these there was no dispute,) and also in an action at the suit of the defendant, against a person named Austin, in which the defendant had recovered against Austin, and the costs had been taxed as between party and party, at 511. 13s. but those costs could not be obtained of Austin. In the bill delivered in the present case, this was charged in the following terms,—

Austin v. Clifford.

"An action having been brought, and judgment obtained, the costs of the action were taxed at 511. 13s."

The taxation between party and party by the master was proved.

*Lawes, for the defendant, objected, that as it was not stated in the bill delivered, what was done by the plaintiffs as attornies, to this amount,

in that action, they were not entitled to recover for it.

Richards, for the plaintiffs, argued, that as this was the amount allowed by the master, as between party and party, the bill in its present form was quite sufficient; and as the only use of ever stating items in an attornies bill, was for the purpose of having it taxed, that was in this case rendered unnecessary.

ABBOTT, C. J. I shall hold that the plaintiffs cannot recover this sum of 511. 13s. A bill must be delivered with items, if for no other purpose, at least to show that the party is not charged for the same thing twice over. I think this bill charging a sum in the lump is not sufficient, but as to the other business done the plaintiffs are entitled to recover for it.

Verdict for the plaintiffs—Damages 331.

Richards, for the plaintiffs. Lawes, for the defendant,

[Attornies—Drew & Co. and Ingold.]

*COURT OF COMMON PLEAS. [*71

SITTINGS IN LONDON, IN TRINITY TERM, 1825.

BEFORE LORD CHIEF JUSTICE BEST.

WATTS v. COLLINS.

In an action on an attornies bill, it is sufficient, to bring the bill within the stat. G. 2. 2. c. 23, that some of the items upon the face of them, are of such a nature as to show that a cause must have been depending in some court: and it is not necessary to prove aliunde, that there was a cause depending.

Assumpsit on an attornies bill. The bill contained charges for the following

"Writing long letter relative to your defence, in the actions commenced against you by Pigeon and Benson."

"Attending Mr. Tricker, when he proposed to take a cognovit."

- "Writing letter upon the subject of your procuring bail, and attending you thereon."
- "You wishing to have Tricker served with a copy of a writ; attending you, stating that as you were in custody, it would be dangerous to commence proceedings; with which you appeared satisfied."

"You wishing to know what I had done with Tricker's actions, attending

you, advising you to settle them, you having no defence."

Vaughan, Serjt., went for a nonsuit, on the ground that the bill contained

taxable items, the terms of the stat. 2 Geo. 2, c. 23, not having been complied

Wilde, Serjt., and Platt, for the plaintiff, contended, that the bill did not contain taxable items. If an attornies attending to talk to his client, and his writing to him, are taxable, there is hardly any thing that is not so. What is required is a proceeding in Court. This was *held in all the cases. They cited Mowbray v. Fleming, 11 East, 285,† and Fenton v. Correia, ante, p. 45.

BEST, C. J. Asked the defendant's counsel, whether they were in condition to prove the fact of there being actions in which these things charged for

were done?

The defendant's counsel replied in the negative; and contended, that it could not be doubted, from the nature of the charges, that there were suits depending. Preparing an affidavit had been held to be a common law charge. It is not necessary that a process should be issued, but only that the attorney should be engaged. One of the items is about a cognovit, and there must be a cause depending before a cognovit. And attending a man, advising him respecting

discontinuing proceedings, is a taxable item.

BEST, C. J. I have paid all the attention I can to this case, and am of opinion, that some of the items are taxable. It must appear that there were some proceedings in a cause; for, unless there was business done in a Court, the bill is not subject to taxation. But it is not necessary that the proceedings should be produced to show this. There is a case in the 6 T. R.‡ in which it was held, *that items for drawing an affidavit of debt, attending the party to get it sworn, and for the fee paid for the oath, made the bill a taxable bill, as those were for proceedings in Court. And in Mowbray v. Fleming, the item was held not to be taxable, because the communications with the plaintiff were about the defendant's brother; and it did not there distinctly appear that the plaintiff was the attorney in the cause, and the defendant might have gone to see how far he could become security for his brother. The question is, if, looking at this bill, I can see that business was done in some case. It seems, that the defendant wanted bail. This he would not have required, if no action had been brought, and the last item, of advising the discontinuance of some actions, shows that there was some cause. And there are items for assistance given in the course of causes, which I must take to have existed at It is for the benefit of attornies' bills should be taxed. I am therefore of opinion that on this the plaintiff ought to be called.

But it appearing that there was a claim for rent, on which the plaintiff was entitled to a verdict, the whole matter was afterwards referred to the Protho-

notary.

Wilde, Serjt., and Platt, for the plaintiff.

Vaughan, Serjt., and Comyn, for the defendant.

[Attornies—Watt, Scott & Son.]

[†] In the case of Mowbray v. Fleming, the item considered by some of the judges not to be taxable, was the following, "To attending with you, both by myself and clerk, on Mr. Towse, in the City, respecting a suit at law commenced against your brother Richard Towse, in the City, respecting a suit at law commenced against your brother Richard Flexing; when, after consulting counsel, and after several other attendances and letters, the business was adjusted to your satisfaction." But that case was decided on another point, namely, that if an attorney having delivered so bill, deliver a particular under a judge's order, containing some taxable matters, and some not, he may recover for those which were not taxable. But in the case of *Hill v. Humphries*, 2 Bos. & Pul. 343, it was decided, that if an attorney delivers a bill, in which there is one taxable item, the whole bill is taxable.

Winter and Another v. Payne, 6 T. R. 645. Vol. XII.-58

*SITTINGS AT WESTMINSTER, AFTER TRINITY TERM, 1825

BEST, Esq. v. OSBORN.

If a general warranty of a horse be proved by parol, (the written contract for the sale not being forthcoming,) the fact that the witnesses who proved it, saw a notice board on the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the jury, for theze to say whether this

formed any part of the original contract.

If the owner of a horse, sold by a stable-keeper with a warranty, go to the buyer and request to have the horse back, stating that he did not authorise the warranty of seams. ness, and the buyer refuse to give it up, saying, I know nothing of you, I bought the horse of Mr. O., such refusal is not a waiver of the warranty.

Action on the warranty of a horse. On the part of the plaintiff, proof was given of a general warranty of soundness by the defendant, who was a stable keeper; and sold the horse in question, on the behalf of a Mr. Tawney. The defendant's son had got back from the plaintiff a written contract given on the sale, which contained a warranty, by fraudulently representing that he had the plaintiff's authority to require it, ante, Vol. 1, p. 632. It was therefore not produced. But the witnesses who proved the warranty, admitted that they saw a board on the defendant's premises, which contained a notice, that horses warranted sound, not returned within six days, would not be taken in. was unsound, because it had had a nerve divided. It was not returned within the six days.

The owner of the horse, Mr. Tawney, (who, it appeared, had not authorised the warranty by the defendant,) applied to the plaintiff, and told him he would take the horse back; but the plaintiff not being at that time aware of the horse's defects, did not consent, but said, "I know nothing of you, Sir; I

bought the horse of Mr. Osborn."

For the defendant, it was contended, that the plaintiff could not recover. First, on account of the notice contained on the board, which was a qualification of the warranty, the plaintiff not having complied with its terms; and Second, because he had waived the warranty, by consenting to retain the horse, when the owner requested that he might be delivered up to him. The case of

Buchanan v. Parnshaw, 2 T. R. 745,† was cited on the first point.

*Best, C. J. There are two questions in this case, besides that of the soundness of the horse: First, Whether there was a warranty? Secondly, Whether that warranty has been got rid of? The declaration is on a general warranty, making no mention of the condition to return within six days. And it is for the jury to say, whether the board which the plaintiff's witnesses saw, formed any part of the original contract; for if it did not, it will not avail the defendant. It appears that the written contract was got back by means of fraud. If there were any other evidence of the contract than that which the plaintiff has given, it would have been easy for the defendant to have produced it. In the absence of such evidence, unless the jury shall think that the contents of the board formed a part of the contract, the warranty in the declaration is made

[†] In that case the horse was sold at a public auction, warranted sound, and six years old; one of the conditions of sale at the auction was, that horses sold there should be deemed sound, unless returned within two days. The horse in question was returned ten days after, on the ground that he was twelve years old, instead of six. The Court held, that this condition of sale, applied only to warranties of soundness, and not to those of horse's are a horse observed whether was unacted as no in this could horse's age. And Lord Kenyon observed, that there was good sense in making such conditions at public sales, as to the one, which did not apply as to the other.

out. The case in the 2 T. R. is different from this; that was the case of a sale by auction, and any man who buys at an auction, knows that he is buying subject to conditions of sale. But in this case there is a special contract between these parties complete in itself. With respect to the second question, has the warranty been dispensed with? In point of law, it cannot be rescinded without the consent of the plaintiff, and it is in evidence that he did not consent to waive the warranty; he merely said to Mr. Tasoney, I know nothing of you, I bought of Osborn.

Verdict for the plaintiff.

Wilde, Serjt., and Dwarris, for the plaintiff. Vaughan, Serjt., and Platt, for the defendant.

[Attornies—Bevan, and Taylor.]

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*NEWBORN v. JUST.

A keeper of a booking house cannot set up a notice, that he will not be answerable for goods, if above a certain value, as a defence against the effect of negligence in himself or his servants.

The declaration stated that the defendant kept a house called the Spotted Dog, for the purpose of receiving trunks, &c., to be conveyed by carriers to various places, &c., and that on the 26th March, the plaintiff delivered a trunk, containing wearing apparel, to be delivered for his son, at an academy, at Sidcup, in Kent; and that the defendant failed in his duty to deliver, and so negligently conducted himself, that the trunk was eventually lost.

Two witnesses for the plaintiff proved the delivery of the trunk, and the pay-

ment of two-pence for the booking.

A person residing at the academy at Sideup, proved, that although the carrier delivered some parcels at the house, on the day in question, the trunk was not of the number.

Beer, C. J. Do not you prove that the defendant did not put it into the cart. You must call the carrier. The jury cannot at present presume that the de-

fendant did not do his duty.

The carrier was then called, and stated that on the day in question, no trunk for Sideup had been delivered to him. He added, that there was a notice at the house, in the usual form, stating that the defendant would not be answerable for goods above the value of 51., unless specially paid for. This notice he said was to protect the house as well as the earrier.

The trunk in question, was admitted to be, with its contents, of greater value

than 5*l*

Wilde, Serjt., for the defendant, relied on the effect of the notice,

BEST, C. J. I don't think the notice will assist you; *you are not in the situation of a carrier. You are not an insurer. This notice is to protect from insurance. But it has been decided over and over again that notice does not protect a carrier against negligence, and your client can only be liable for negligence.

Vaughan, Serjt., and Holt, for the plaintiff, cited the case of Batson v. Dono-

van, 4 B. & A. 21.

Wilde, Serjt. My client not being bound to receive parcels at all, may by contract limit his responsibility.

Brer, C. J. Then your client must give distinct notice to that effect: and

if the public were told that he would not be liable either for the negligence of himself or his servants, he would not have many persons trust him.

Verdict for the plaintiff.

Vaughan, Serjt., and Holt, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies-Spencer, and Thompson.]

SITTINGS IN LONDON, AFTER TRINITY TERM, 1825.

HARDING v. DAVIES.

If at an interview between plaintiff and defendant, when defendant was willing to pay 104, a third person present offer to go up stairs and fetch that sum, but is prevented by the plaintiff 's saying he cannot take it; such offer is a good tender: and although the defendant did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act.

WORK and labor, and goods sold. Pleas—The general issue, and a tender of 101.

To prove the tender, a woman who lodged in the defendant's house was called; she said that she was present *at an interview between the plaintiff and defendant, at which the defendant was willing to give the plaintiff 101. and that she offered to go up stairs and fetch that sum; but the plaintiff said, she need not trouble herself, for he could not take it. She further stated, that she had the money up stairs. And that, although the defendant was present, he did not take any notice of her offer at the time.

Wilde, Serjt. This will not do. There is a distinction between the case of a man having money in his hand, and another saying do not unroll it, and that of a party saying I have money up stairs, and will go and fetch it. This tender, also, was not made by the command of the defendant, he not attending

to it at the time.

BEST, C. J. He has ratified the act by pleading it. And I think the witness has proved a good tender. I agree, that it would not do, if a man said, I nave got the money, but must go a mile to fetch it.

Wilde, Serjt., and F. Pollock, for the plaintiff.

Pell, Serjt., for the defendant.

[Attornies—B. Davies, and Brutton.]

See Cheminant v. Thornton, ante, p. 50, and Laing v. Meader, ante, Vol. 1, p. 257.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER TRINITY TERM, 1825.

DOE, on the several demises of CLARK et al., v. SPENCER.

The provisional assignee of the Insolvent Debtor's Court may maintain ejectment for the property of an insolvent, under the provisions of the 1st Geo. 4, c. 119, and the 3d Geo. 4, c. 123.

EJECTMENT. The count on which the plaintiff relied, was on the demise of *Henry Dance*, who was the provisional assignee of the court for relief of insolvent debtors. It did not appear that any assignment had been made by the

provisional to any other assignee.

Pell, Serjt., for the defendant. The provisional assignee is not in a situation to maintain ejectment. He has the property lodged in his hands only pro tempore, previous to its being transferred to the assignee appointed by the creditors; and it is this latter assignee that must bring the action, which he can do under the authority of a meeting of creditors, with the approval of the commissioners. The provisional assignee is only a conduit-pipe to convey the property to the other assignee, for the benefit of the creditors. The 4th, 5th, 7th, and 11th sections of the stat. 1 Geo. 4, c. 119, go to show this clearly.

Best, C. J. I am of opinion that s. 11 does not prevent the provisional assignee from exerting any right against the defendant. It is for the benefit of the creditors. The statute speaks of arrest. This does not look like a reference to ejectment. The estate is completely vested in the provisional assignee. It is not intended that the provisional assignee should retain the possession, but that he should afterwards assign to another assignee, whom the Court are to appoint; and the property is to remain in the provisional assignee, till such other assignee accepts *the trust; and probably in many cases it may be difficult to find any one willing to take it. I am therefore of opinion, that as it does not appear that any other assignment has been executed to any other assignee, the property continues in the hands of the provisional assignee, and he may maintain an action of ejectment for it.

Verdict for the lessor of the plaintiff.

Lawes, Serjt., and E. Lawes, for the plaintiff. Pell, Serjt., for the defendant.

[Attornies—Croft, and Wagener.]

In the ensuing *Michaelmas* Term, *Wilde*, Serjt., moved for a rule *nisi* for a new trial, and mentioned, in addition to the sections of the 1 G. 4, referred to at *Nisi Prius*, the 2d section of the 3 G. 4, c. 123. But the Court, after consideration, decided that, on the construction of both the statutes, it seemed not to be the intention of the legislature to clog the proceedings at the trial with the consideration of any such question, as whether the provisional assignee could maintain the action; and that it was not, therefore, matter of defence: but the party must apply by motion either to the insolvent debtor's

Court or the Court in which the action was brought, as he should be advised, to gain relief upon the subject.

Rule refused.

By the 4th section of the Insolvent Debtor's Act, 1 G. 4, c. 119, it is enacted that, "such prisoner shall, at the time of subscribing such petition, duly execute a conveyance and assignment, in such manner and form as the said Court shall direct, of all the estate, right, title, interest and trust of such prisoner to all the real and personal estate and effects of every such prisoner, except to the wearing apparel, bedding, and other such necessaries of such prisoner and his or her family, not exceeding in the whole the value of twenty pounds, so as *to vest all such real and personal estate and effects in the provisional estate and effects in the provisional obtain his discharge by virtue of this act, such conveyance and assignment shall, from and after the dismission of the petition of such prisoner praying for his discharge, be null and woid to all intents and purposes."

"\$ 5. Provided always, and be it further ensored, that the said Court shall and may order and direct such provisional assignee, or such assignee or assignees as are hereinafter mentioned, to pay out of the said estate and effects before mentioned to the said

after mentioned, to pay out of the said estate and effects of our mentioned to the said prisoner, such allowance for his or her support and maintenance during such prisoner's confinement in actual custody as to the said Court shall seem reasonable and fit."

"§ 7. And be it further enacted, that when the said Court shall adjudge any prisoner so be entitled to his discharga, such Centr shall special a proper person or proper persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this act; and when such assignee or assignees shall have signified to the said Court their acceptance of the said appointment, every such prisoner's estate, effects, rights and powers, vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee to such assignee or assignees, in trust for the benefit of such assignee or assignees and the rest of the creditors of every such prisoner, in respect of or in pro-

portion to their respective debts, according to the provisions of this act."

"\"\11. Provided, and be it also enected, that no suit in law be proceeded in further than an arrest on mesne process, or suit in equity be commenced by any assignee or assignees of any such prisoner's easte and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice to be given, at least fourteen days before such meeting, in the London Gazette, or other newspaper which shall be published in the neighborhood of the last residence of such prisoner, for that purpose, and without the approbation of one of the commissioners of the said Court."

By stat. 3 Geo. 4, v. 123, v. 2, it is enacted "that it shall be lawful for the provisional assignee to see in his own name, if the said Court shall so order, for the recovery, obtaining and enforcing of any estate, debts, effects or rights of any such prisoner; and is case of the dismission of the petition of any such prisoner praying for his discharge, which the said Court is hereby empowered to dismiss, whenever it shall seem fit, all the acts done before such dismission by the said provisional assignee, or other persons acting under his authority, according to the order of the said Court, shall be good and valid."

*ADJOURNED SITTINGS IN LONDON, AFTER TRINTTY [*82 TERM, 1825.

DARNELL v. TRATT.

A mother took her son to school, and saw the master, but no evidence was given of what passed at that time. Afterwards, a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable: Held, that the statute of fraude did not apply, and it was proper to leave it to the jury to say, under those pircumstances, whether the original credit was not given to the uncle.

Assumpsit by the plaintiff, a schoolmaster, for the education of the defendant's nephew. The plaintiff was the master of a boarding school; the defendant, the uncle of a lad, who had been at the plaintiff's school. It appeared that the boy's mother took him to school, and had an interview with the master at the time; but no evidence was given of any thing that passed between them. It also appeared that the boy's father was living at that time, but had died not long after. When the boy had been some time at school, a bill was delivered by the plaintiff's son to the uncle, who said, "that it was quite right to send him the bill, for he was answerable for young Jeremy;" that he could not conveniently pay it at that time, but would, when the next became due, settle both together.

Wilde, Serjt., argued, that the plaintiff should be nonsuited, on the ground that this was a mere collateral promise by the uncle, within the statute of frauds, and, therefore, ought to be in writing: and he argued, that parol evidence ought not to be received, as it did not go to prove any undertaking by

the defendant, antecedent to the time when the debt was contracted.

Best, C. J. If you, who set up the statute, can show that the original credit was given to somebody else, and not to the defendant, then the statute will apply, and the objection will be unanswerable. But, consistently with the decisions, I must receive the evidence. I think the statute of frauds has been put aside too much; and Westminster Hall now thinks so too. As at present advised, I am of opinion, that there is evidence to go to the jury of *an original undertaking on the part of the defendant. But I have no objection to the point being reconsidered. His Lordship then left the question to

the jury, as to whom the credit was given.

Verdict for the plaintiff, with leave to Wilde, Serjt., to move to enter a nonsuit, if the Court should think there was no evidence to go to the jury of the original credit being given to the uncle.

Bosanquet, Serjt., and Comyn, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies-Baddeley, and Pritchard.]

In the ensuing Michaelmas Term, Wilde, Serjt., moved, pursuant to the leave given. He contended, that it ought not to have gone to the jury as a question of credit. The mother took the boy, and she might have been called as a witness. The presumption was, that the credit was given to the mother. The defendant did not appear to have been any party to the original contract, and could only be charged under the statute of frauds; because, prima facie, the debt appeared to be the debt of another. There was no proof of the defendant interfering at any time before the debt was contracted; therefore the admission he made was not evidence for the jury. If the object of the statute is to prevent perjury, then it applied to this case, where the admission, if varied only by the tense, would be materially altered.

PARK, J. The verdict below was correct; and there is no objection to any thing done at the trial. The question is, whether the original undertaking was by the defendant or not. In every case of evidence, all depends upon a tense.

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It is said, that the acknowledgment was made *after part of the debt was contracted. What is more natural than that this woman should have a kind brother-in-law, and that she should have told the plaintiff so? If she had been called as a witness, observations would have been made upon her coming

to destroy her own liability.

BURROUGH, J. The verdict was quite right. The evidence was proper for the jury; and it was properly left to them. Why might not the jury infer that the mother was the agent of the uncle? This is made out by the admission.

GAZELEE, J. I am of the same opinion. BEST, C. J. The evidence was proper for the jury, unless you can get rid of the cases which decide, that, where the man is sued who made the original promise, though it was no benefit to him, yet the statute does not apply.

Rule refused.

To constitute a promise to answer for the debt of another within the statute of frauds, it is necessary that the party whose debt it is, should be liable, as well as the person it is necessary that the party whose debt it is, should be liable, as well as the person making the collateral promise, and such promise must be in writing. But if the party for whose benefit the promise is made is not also liable to pay, but only the maker of the promise, then such promise is not within the statute of frauds, and need not be in writing. The cases of Jones v. Cooper, Cowp. 227; Matson v. Wharam, 2 T. R. 80, and several other authorities go to show the former propositions. The cases of Read v. Nash, 1 Wils. 305; Harris v. Huntbach, 1 Burr. 373; and Goodman v. Chase, 1 B. & A. 297, establish the latter. But if a guarantee is made in writing, that satisfies the statute of frauds; and a promise, to take it out of the statute of limitations, need not be in writing. Gibbon v. M'Casland, 1 B. & A. 690. A written guarantee, to be binding, must state the consideration for the promise as well as the promise itself. Saunders v. Wakefield, 4 B. & A. 595.

*ANDERSON v. SHAW.

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A plaintiff may be nonsuited after a plea of tender.

Assumpsit. Pleas-Non-assumpsit and a tender. The plaintiff did not

appear, and was about to be nonsuited, when

Bosanquet, Serjt., and Campbell, who were for the defendant, argued, that, after a tender, a nonsuit could not take place. They cited Gutteridge v. Smith, 2 H. B. 377, and Harding v. Spicer, 1 Camp. N. P. C. 327.

BEST, C. J. On the authority of these cases, I shall let the defendant have

a verdict; but I feel strongly that it is incorrect.

Bosanquet, Serjt. In this case a rule nisi was obtained for judgment as in case of a nonsuit; and the plaintiff opposed it on the authority of Harding v. Spicer.

Verdict for the defendant.

[Attornies—Macdougall, and Gregson & F.]

In the ensuing Michaelmas Term, Onslow, Serjt., obtained a rule nisi for setting aside the verdict entered for the defendant; which, after argument, the Court made absolute.

In the case of Gutteridge v. Smith, 1 H. B. 374, the principal point in dispute was, whether, if money were paid into court generally on the whole declaration, and one of the counts were on a bill, it was necessary to prove the defendant's handwriting to the bill, and the Court held that it was. (But on that point see ante, Vol. 1, p. 20, n. 1.) And Mr. Justice Heath said, in the course of his judgment, 2 H. B. 377, "It is clear, that after a tender, the plaintiff cannot be nonsuited." The case of Harding v. Spicer, 1 Camp. 327, was tried at Kingsten before the carried at the car 327, was tried at Kingston before the same learned judge, and at that time that point was then so ruled. Mr. Campbell has, however, in a very able note to that case, collected authorities, which tend to show that *a plaintiff might be nonsuited on the plea of tender as well as any other plea, because a nonsuit is merely the plaintiff s declining to appear to hear the verdict.

TUCKER et, al., Assignees of GILBERT, a Bankrupt, v. RUSTON et al.

The lodging a delivery order with a wharfinger, is sufficient to transfer the property in goods lying at a wharf, without any reweighing or rehousing; and if the party giving the order afterwards become bankrupt, his assignees cannot maintain trever under such circumstances, as for goods in his order and disposition.

TROVER for carraway seeds. It appeared from the evidence for the plaintiff, that, on the 12th of *February*, 1824, six casks of carraway seeds were housed in the bankrupt's name, at a wharf called *Gulley Quay*; and that on the 15th of *March*, 1824, the following order was lodged with the wharfinger:

" 6th March, 1824.

"Deliver to Messrs. T. and T. Ruston. or order, the six hogsheads of carraway seeds, rehoused to John Gilbert, on the 11th of February, 1824.

(Signed) "John Gilbert."

"Indorsed, 15th March, 1824.
"Deliver the annexed to our order.

"T. & T. Ruston."

They remained at the wharf till the 13th of April, 1824, at which time they were delivered to a Mr. Raymond, in consequence of an order given by the defendants. There was no order to rehouse or transfer. Up to the time of the delivery to Raymond, the goods remained in the wharfinger's books in the name of Gilbert; and the rent was charged to him. But the wharfinger, who proved these facts, stated, in answer to a question from the Court, that if any one had come to inquire, he would have been told that the goods were the property of the defendants. The act of bankruptcy was committed by Gilbert, on the 11th of April, 1824. For the defendants, it was proved, that they had accepted a bill for the bankrupt for 300l. on these *carraway seeds, which were worth 310l. and in consequence received the order in question, and were to have a power of sale.

Taddy, Serjt., for the plaintiff, contended, that, upon this evidence, the goods belonged to the bankrupt at the time of the act of bankruptcy, and as such passed to his assignees—they had never been taken out of his name—there was no reweighing or rehousing, as in such cases there should be. The defendants were not vendees. They had advanced 3001. on an article worth 3101.: they had sold the article; and the question would be, how much they had a right to detain from the plaintiffs. There was no notorious act by which any one but themselves could know that there was any transfer of possession; and

he cited Knowles v. Horsefall, 5 Barn. & Ald. 134.

Vaughan, Serjt., for the defendant, relied on the circumstance of their having a power to sell; and cited Harmer v. Anderson, 2 Camp. N. P. C. 243.

BEST, C. J. The defendants in this case had an authority to sell. There is therefore no conversion. The 101. cannot be recovered in this action, but must be sought in an action for money had and received. I am of opinion that the goods were not in the order and disposition of Gilbert, after the delivery order of the 6th of March. I think the plaintiff should be called; but I am willing, if it is required, to leave the question to the jury.

Taddy, Serjt., thought that unnecessary; and the plaintiff was

Nonsuited.

Taddy, Serjt., and F. Pollock, for the plaintiffs. Vaughan, Serjt., and Campbell, for the defendants.

[Attornies—Stevens of Wood, and Parnther of Turner.]

*ARNOTT v. REDFERN et al.

Assumpsit on a judgment of the Admiralty Court of Scotland, which gave interest on a balance of accounts from 1811, to the time of payment. The contract was by letter, written in London. The services were performed in Scotland, that being the plaintif's place of residence. Held at Nisi Prius that a contract made in England, to be executed in Scotland, ought to be regulated by the rules of the English law; and that this contract having been made in England, interest could not be recovered, merely because it was given by the decree in Scotland.

The declaration stated, that in the year 1818, a decree was pronounced in the Admiralty Court of Scotland, which directed that the defendants should pay to the plaintiff a balance of 236l. "with interest thereon, from the month of March, 1811, till the time of payment," together with other sums for expenses, &c.; and that in consequence of such decree, the defendants became liable to the plaintiff to the amount of the said several sums. The plea was—the general issue.

A certified copy of the proceedings in Scotland, under the seal of the Admi-

ralty Court there, was put in and read.

It appeared, among other things, that the original claim was for services performed by the plaintiff, who resided in *Scotland*, in the sale of goods for the defendants, who lived in *London*. The contract was made by letters between

the parties, both being at that time in London.

The plaintiff undertook to go four journies annually through Scotland, to sell and collect for the defendants, and to remit regularly all monies received; to guaranty one fourth part of the sales, allowing his whole commission to stand over, for the purpose of making up any deficiency that might arise by bad debts, so far as the fourth part of the real losses. The defendants, in consequence of this undertaking, agreed to employ the plaintiff as their agent, and to pay him one per cent. upon the amount of the sales, and one-half per cent. more upon the gross amount for the guarantee of the fourth-part.

Vaughan, Serjt., objected to the claim for interest. This is only an action of assumpsit; and the judgment is merely prima facie evidence, and not con clusive as to the right of demand. We may impeach the claim now, as we might have done at the time when the matter was before the *Court in [*89 Scotland. The debt is not such a debt as would carry interest in England; and if error had been brought here, interest would not have been allowed.

Best, C. J. Is there no doubt that interest would not have been allowed

Vaughan, Serjt. I will admit that the balance of the accounts was properly recovered.

BEST, C. J. Is it an English transaction? For, if it is, it will be regulated by the rules of English law; but if it is a Scotch transaction, then the case will be different.

Vaughan, Serjt. It is a debt arising upon contract; and the contract was made in England; therefore, it must be considered as an English contract, though the services may be to be performed in Scotland. The plaintiff brought his action on his judgment in 1819; but, as a foreigner, being required to give security for costs, he lay by for six years, and now he claims interest for the whole of that time. The case of Walker and Others v. Witter, Doug. Rep. 1, is a very strong authority in favor of the defendants, for there Lord Mansfield says, that assumpsit will lie on foreign judgments; but they are only prima facie evidence of the debt, and are examinable: and his Lordship lays down, that in actions on judgments of foreign courts, and of courts in this country not of record, the Court in which such action is brought may examine into the justice of the decision of those courts, and cites an instance of Lord Chancellor Hardwicke examining the justice of a decision of the House of Lords.

because the original decree was in a court in Wales, which was not a court of record.

BEST, C. J. This is the case of a Scotchman, who comes *into Engand and makes a contract. As the contract was made in England, although it was to be executed in Scotland, I think that it ought to be regulated according to the rules of the English law. This is my present opinion. These questions of international law do not often occur. I shall therefore direct the jury to find their verdict for the principal sum, and I will give the plaintiff leave to move to increase the amount by the addition of interest.

Verdict for the plaintiff.

Taddy, Serjt., and Patteson, for the plaintiff. Vaughan, Serjt., and Comyn, for the defendants.

[Attornies—Adlington & G., and Wright.]

On the first day of the following Michaelmas Term, Taddy, Serjt., obtained a rule nisi, pursuant to the leave given, which came on to be argued in the course of the same Term.

Vaughan, Serjt., showed cause.

Taddy, Serjt., was heard in support of the rule, and the Court took time to

consider of their judgment.

Their Lordships now gave judgment: but being of opinion, that by the law of *England* the plaintiff's balance would have carried interest, the point ruled at Nisi Prius was not determined by the Court.

Rule absolute for adding the interest.

'91] *FURTHER ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1825.

MAVOR, Assignee of HENRY PYNE, a Bankrupt, v. JOHN PYNE.

If a party agree to take a work which is to be published in eighteen numbers, at intervals of two months, and after receiving several numbers refuses to take any more, and also to pay for those which he has had, an action will lie for the price of the latter; and the statute of frauds does not apply, although the original contract was not to be executed within a year; for the law in such case will imply a further contract to pay for each number as it is delivered.

A debtor to a bankrupt, when sued by his assignee, cannot set up the statute of limita-

tions as an objection to the petitioning creditor's debt.

An allegation stating that before the execution of a certain release, the party who executed it "became and was a bankrupt," is supported by proof of his having executed it after an act of bankruptcy, which was not followed by a commission for nearly two years, it appearing that the execution took place while the party was in prison.

Assumpsir for goods sold by the bankrupt to the defendant. Pleas—the general issue, and a release by Henry Pyne. Replication, that before the release was executed, the said *Henry Pyne* "became and was a bankrupt." Issue thereon.

The action was brought to recover the price of certain numbers of a work, called "Pyne's History of the Royal Residences." From the evidence offered to support the petitioning creditor's debt, it appeared that a sum of 115l. was due by the bankrupt for goods furnished to him by the petitioning creditor, the delivery of which commenced in 1812, and was completed in 1818.

Vaughan, Serjt., for the defendant, contended, that the statute of limitations applied to the debt, as it did not appear how much of the 1151. was due within six years.

Spankie, Scrit., for the plaintiff. It must be pleaded.

Vaughan, Serjt. The debt is not a legal debt. We could not plead the statute. We knew not what debt they would rely on. It must appear that the debt is a good petitioning creditor's debt.

Comyn, on the same side. It must be such a debt as *would support an action by the petitioning creditor against the bankrupt. There is no other course that the defendant can adopt.

BEST, C. J. I think there is. You may petition the Court of Chancery. Comyn. The bankrupt may petition that the commission may be superseded: but a debtor is not damnified by the commission till he is sued, and therefore he is not to petition the Chancellor. The only remedy he can have, is to take advantage of it here. I submit, that the plaintiff must be nonsuited, and that the statute could not be pleaded; for all objections to a commission may be taken advantage of in defending actions brought by the assignees.

Spankie, Serit., and Moody referred to the case of Quantock v. England,

5 Burr. 2628.

Taddy, Serjt., as amicus curiz, referred to a case of Ex parte Dudeney, 15 Ves. 479.

BEST, C. J. Without the case of Quantock v. England, I was disposed to say, that this is not the mode to take advantage of the statute of limitations. There must be a legal debt to support the commission; and a debt above six years is not a legal debt; but it must be taken advantage of by special plea. I wish it never was competent in a Court of Nisi Prius to dispute the proceedings in *bankruptcy: it would be much better to petition the Court of Chancery. I will not carry the objection further than it has been carried already; but I will take a note of it.

It appeared that the work in question was published in numbers, at intervals of two months from each other, at the price of 1l. 1s. each. The defendant, in a conversation with one of the witnesses, admitted, that he had received either seven or eight numbers, but said he should not pay, because the whole had not been sent him. He was informed in reply, that the publisher did not undertake to deliver, and that he might have all the numbers if he had sent for

them. In the whole, the work consisted of eighteen numbers.

Vaughan, Serjt., then objected that the statute of frauds applied to this case. This is one entire work, published in numbers at two months' interval; and twice eighteen months elapsed before its completion. I grant that the purchasers are to pay for every number; but that does not make it less than one entire contract. They cannot split it into parts, and make every number the subject of a separate contract. This question was very much argued in the case

[†] In the case of Quantock v. England, the Court held, "that this objection lay only in the mouth of the bankrupt himself; that he had waived it by appearing and submitting to the commission, and being examined under it; and that, as the debt still subsisted, (though the remedy was taken away,) this was such an acknowledgment of it as put it out of the power of a third person to make the objection."

In this case the Lord Chancellor, after going very fully into the law on the subject, recognizes the authority of the case of Quenteck v. England.

of Boydell v. Drummond, 11 East, 142.† The words of the statute of frauds are, that "No action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, &c."

Best, C. J. You will find a difficulty in applying the case of Boydell v. Drummond to this. In that case, the numbers were some of
them delivered and paid for; and the action was brought for the price of those
sumbers which the party would not take; and it was held that the publisher
tould not recover for them; because the contract was clearly within the statute,
aot being to be performed within a year. But the plaintiff in this case does not
go for more than the price of the numbers delivered; and for them he may
recover.

Vaughan, Serjt. The question remains: Is this one entire contract?

BEST, C. J. Le Blanc, J., in that case says, that you have a right to drop it whenever you please; and I am of his opinion

Spankir, Serjt. The difference is, that in Boydell v. Drummond the con-

tract was executory; and in this it is executed.

Vaughan, Serjt. In the case of Boydell v. Drummond, the defendant had actually signed his name to a list of subscribers, which made it still stronger; in this case, where is there any obligation to pay for one number, though it is accepted? Can it be said that the plaintiff may bring an action toties quoties for every number?

BEST, C. J. If this case touched upon the principles laid down in Boydell v. Drummond, I should feel myself bound by the authority of that case. And even if I differed in opinion, it would govern me, sitting at Nisi Prius. But I subscribe to every word of it. If any inference at all can be deduced from that judgment bearing upon this case, it is an inference unfavorable to the objection which has been made to-day. I will state my brother Vaughan's *proposition, and then he will see how monstrous a proposition it is, and how inconsistent with common sense and common justice, and how unlikely it is, that a court of justice should ever have entertained it.—He says, that it is an entire contract. I agree with him that it is so. But he says, that if there were twenty-four numbers, and twenty-three of them were delivered, and the twenty-fourth was not, the publisher could not recover for the twenty-three. I am of opinion, that there is a subordinate contract; an understanding that each number is to be paid for on delivery. It must be well known to the gentlemen of the jury, that in this city a similar course is constantly adopted in the cases of contracts for the sale of corn. It is necessary that publishers should have the money for each number as it comes out, in order that they may be able to go on with the work. This is always their object, and my brother Vaughan's argument goes to overthrow this. The object of purchasers is the same, because it is not convenient for them to pay for the whole work at once. Taking it to be a contract for the whole, yet it is in part executed. But I will put this case on another ground. The evidence is, that the defendant agreed to take the numbers, and actually took and kept six, seven, or eight. He said, I shall not pay, because you have not given me the whole. To this it was answered -"You may have the remainder; but we did not agree to deliver." In common sense, can a man say—" I will not pay for the eight which I have had; and I will not take any more?" When the first contract was broken off, when the defendant said, "I will not take the whole," I think an implied contract was raised, which may be enforced in this form of action.

[†] In this case the plaintiff brought an action to recover the price of certain numbers of a work, that the defendant, a subscriber to it, refused to take; and the Court held that a contract, being in part completed within the year, did not take the case out of the operation of the statute of frauds.

With respect to the lease pleaded, it appeared that it was executed in April, 1820, by the bankrupt, while he was in prison, and after he had committed an act of bankruptcy. But it appeared that no commission issued against him till the year 1822.

*Upon this state of facts, it was submitted on the part of the defendant, that, under the stat. 46 Geo. 3, c. 135, the issue as to the release must

be found for him.

BEST, C. J. I am of opinion at present, that it is proved, that the release was executed after an act of bankruptcy, and, therefore, that issue must be for the plaintiff.

Verdict for the plaintiff—81. 8s.

Spankie, Serjt., and Moody, for the plaintiff. Vaughan, Serjt., and Comyn, for the defendant.

[Attornies—Van Sandau & T., and Walker, R. & R.]

In the ensuing Michaelmas Term, Vaughan, Serjt., moved for a rule nist for a new trial, on the ground that the agreement was within the statute of frauds; but the Court were of opinion, that the case was distinguishable from that of Boydell v. Drummond, on which he had founded his argument, and that the statute did not apply. He then went on the point reserved as to the sufficiency of the petitioning creditor's debt.

BEST, C. J., observed, that Quantock v. England was in point, in its favor; and that the case in 15 Vesey, confirmed Quantock v. England, and over-

ruled a holding at Nisi Prius, which was contrary to it.

Vaughan, Serjt. We could not plead the statute of limitations, and there-

fore are in the same situation as if it had been pleaded.

BEST, C. J. A co-creditor may say that a man, whose debt is barred by the statute of limitations, shall not prove under the commission; and that objection must be made in Chancery by petition. In this case, the bankrupt does *not make the objection; and why should a party be allowed to do it, standing in the situation of this defendant?

GAZELEE, J. The statute of limitations is for the benefit of the debtor, that he may not be harassed; but a person situated as this defendant is, has no

right to use it as an objection to the debt of another person.

The point as to the release was then mentioned; but the Court were of opinion, that, on the state of the pleadings, that question had received its proper determination at *Nisi Prius*; and therefore, upon all the points, the

Rule was refused.

MUNN v. GODBOLD et al.

COVENANT on a deed, dated in September, 1819. The declaration stated, that the defendants had agreed to appoint the plaintiff their agent for the sale of

It there are two parts of a covenant under seal, one of them on a stamp and executed by the defendant, and the other a counterpart not stamped, and the party who had the custody of the part which was stamped, at the time of bringing an action upon it has lost it, and it cannot be produced, he may prove the draft as secondary evidence, and is not compellable to take the unstamped counterpart, subject to the objections that may be made to it, although he has given notice to the defendant to produce it at the trial.

their vegetable balsam, on the continent of Europe; and that, in consideration of 400l., they were to furnish him with such a quantity as, if sold at 20 francs, would realize a sum of 600l., and give him a profit of 50l. per cent. It then went on to allege, that the defendants covenanted, that, in case the whole 600l. worth could not be disposed of by the plaintiff, the defendants should take back such part as remained; and then averred, as a breach, that there was a quantity unsold, which the defendants refused to receive again. Pleas—Non est factum, and several special pleas, not material to the point decided.

It appeared, that there were two parts of the deed declared on, one executed by the plaintiff, and the other by the defendants. The part executed by the defendants was lost from the plaintiff's custody, and was not forthcoming again at the trial. It had been properly stamped. The counterpart in the possession of the defendants was in Court, ready to be put in; and notice had been given them to produce it. It was stated not to have any stamp.

For the plaintiff, the attorney, who prepared the deed, was called to give evidence of its contents from the draft. He proved, that it contained a true

copy of the instrument, in the state in which it was signed.

Taddy, Serjt., objected to the admissibility of this evidence. They are not at liberty to give the draft in evidence, but must put in the counterpart. They have given us notice to produce it; and we are willing to put it in. The deed is not perfect without the counterpart; and the counterpart is the next best evidence, when one part is lost. It is so in the case of a lease. Roe dem. Urry v. Harvey, 4 Burr. 2484.

BEST, C. J. How could they get at this counterpart for the purpose of

having it stamped?

Taddy, Serjt. They might move in Court for the other party to attend with it at the Stamp-office.

BEST, C. J. The last decision in the Common Pleas is, that a party is not compellable to produce a deed, unless he holds it as a trustee.

Pattison, on the same side, cited the cases of Rex v. Castleton, 6 T. R.

236, and Rippener v. Wright, 2 B. & A. 478.

We declare on the instrument executed by them; and we are to produce that or give secondary evidence of its contents. We are not to be driven to their counterpart. It is said, that the counterpart is better evidence than the draft; but it is not stamped; and therefore it is of no validity at all. The cases go this length only, where there is only one instrument, and that is in the hands of one of the parties to it, he shall be compellable to produce it, because he holds it as a trustee for both.

BEST, C. J. I shall admit the draft as secondary evidence.

Verdict for the plaintiff.

Vaughan, Serjt., Chitty, and Lee for the plaintiff. Bosanquet and Taddy, Serjts., and Pattison, for the defendants.

[Attornies—Steel & Nicol, and J. & H. Lowe.]

In the ensuing Michaelmas Term, Bosanquet, Serjt., obtained a rule nisi for a new trial, on the ground that the draft ought not to have been admitted as

In that case (p. 2489) Lord Mansfield observed, that "in civil cases the Court will force parties to produce evidence which may prove against themselves, or leave their refusal to do it (after proper notice) as a strong presumption to the jury. The Court will do it in many cases, under particular circumstances, by rule before the trial, especially if the party from whom the production is wanted applies for a favor. But in a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in Court."

evidence under the circumstances. He cited, in addition to the cases mentioned at Nisi Prius, Rivers v. Rivers, 2 Atk. 21.

The question came on to be heard in the course of the same Term; and the Court, after argument, decided, that the draft was properly admitted in evidence, and therefore

Discharged the rule.

*COURT OF KING'S BENCH. [*100

SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

STUART et al. v. WHITAKER et al., Sheriff of Middlesex.

If the attorney for an execution creditor, on being informed of a claim by the landlord for rent, direct the sheriff's officer to withdraw the execution, and he did so, and the plaintiff sue out a cz. sz. for the debt, such execution creditor cannot bring an action against the sheriff for falsely returning to the £. fz. that so much rent was due; and he will not be entitled to recover, though he show that the supposed landlord had not a right to the rent claimed; and that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was.

Case against the late sheriff of Middlesex for a false return to a writ of testatum fieri facias, sued out against James Phillips, to levy the sum of 201. 10s. at the suit of the plaintiffs. The declaration stated, that the sheriff returned, that they had caused to be seized divers goods to the value of 40l. and no more; and that, after the seizure, they received notice from the landlord of the premises whereon the goods were seized, that the sum of 364 remained due to him for arrears of rent, which rent did not exceed one year's rent of the premises, and notice from the collector of taxes, that 91. 13s. 6d. was due for king's taxes; and "they further certified and returned, that the said rent and taxes, so claimed as aforesaid, were, at the time of such seizure, due and in arrear, and that the said plaintiffs had not paid the rent and taxes due as aforesaid, pursuant to the statutes," &c.; whereas, in truth and in fact, the defendants did not receive notice from the landlord of the premises, whereon, &c., that the sum of 36l. or any other sum remained due for the rent, &c.; and whereas, in truth and in fact, the said rent was not, nor was any part thereof due at the time of the seizure, by means whereof the plaintiffs were greatly injured, &c. Plea-The general issue.

The usual formal proofs having been adduced for the plaintiff, it was shown by a lease, dated April 21st, 1754, *and other subsequent conveyances, [*101 that the residue of a term of eighty-one years from that time, in the house occupied by Phillips, had belonged to a Mrs. Hooper; and it was proved that Mrs. Hooper died on the 6th of March, 1824; and by the probate of her will, which was put in, it appeared that she left Phillips (the person against whom the execution issued) and Miss Millicent Rosamond Stone, her executor and executrix; and by her will Mrs. Hooper devised this house to Miss Stone. The execution was sent unto Phillips' house, on the 29th of May, 1824.

Phillips, on being called as a witness for the plaintiff, proved, that he had rented the house of Mrs. Hooper at 36l. a-year, and that after the execution came in, Miss Stone put in a distress for the year's rent; and the plaintiff's attorney, on being apprised of this, directed the sheriff's officer to withdraw the execution; and the officer accordingly sent away his man, who had previously kept possession: and it was further proved, that the plaintiffs caused him (Phillips) to be taken on a capias ad satisfaciendum, on the 18th or 19th of June, 1824, for this same debt.

Gurney, and Holt, for the defendants.—In this case the plaintiff must be called; because, when a sheriff receives notice that rent is due, the plaintiff cannot call on him to sell, till he (the plaintiff) has satisfied the rent, which, in this case, was clearly due to somebody; and, by the terms of the statute of 8 Ann. c. 14, s. 1, the sheriff is not to pay the rent claimed, but the plaintiff is to cause it to be paid. However, that question can hardly be raised here, as the plaintiffs' attorney, on being apprised of the claim of rent, himself directs the execution to be withdrawn on that ground; and after that he cannot turn round and dispute the claim to rent.

Scarlett, contra. Phillips was never a tenant to Miss Stone; and, this property being leasehold, it vested in the executors; and even if this house was given by Mrs. *Hooper's will to Miss Stone, the rent due before Mrs. Hooper's death would belong to the executor and to Miss Stone.

ABBOTT, C. J. You withdraw the execution, and sue out a capias; and I think that the act of the plaintiffs in so doing is an assent to the claim of the supposed landlord.

Scarlett. I am in a condition to prove, that, when the execution was with-

drawn, it was done in ignorance of the real circumstances.

ABBOTT, C. J. I think that makes no difference. I think that the fact of the plaintiffs' having withdrawn the execution, precludes them from saying that this is a false return.

Scarlett. If the sheriff had returned, that the plaintiffs directed him to withdraw, that might make a difference; but here the sheriff returns certain things as specific facts, which we deny, and come here to try: we can prove, that the plaintiffs were ignorant of the real state of facts till after the execution was withdrawn.

Evidence was given, that the plaintiffs' attorney did not know the nature of Miss Stone's title to the house, till after they had withdrawn the execution.

ABBOTT, C. J. The plaintiffs' attorney did not direct the officer to go back again, but sued out a capias. I am of opinion, that the conduct of the plaintiffs is such as to warrant the sheriff in making this return, and that the plaintiffs cannot now maintain this action.

Nonsuit.

Scarlett, and Comyn, for the plaintiffs. Gurney, and Holt, for the defendants.

[Attornies—John, and Smith & B.]

By the stat. of 8 Ann. c. 14, s. 1, it is enacted, that "no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken "by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the sa. I pa. 'y, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may preced to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby impowered and required to levy and pay to the plair tiff, as well the money so paid for rent, as the execution money."

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In the case of Hemlet v. Simpson, 2 Wils. 140, it was held, that this statute applied to executions sued out on the part of the defendant, as well as to those sued out on the part of the plaintiff, and the executor or administrator of a landlord is within its provisions as well as the landlord himself. Polysair v. Windham, 1 Str. 212. But a ground landlord is not entitled to his rent under this statute, which only respects immediate landlords. Bestet's case, 2 Str. 787. And if there be an execution sued out, and the landlord paid a year's rent, and soon after another execution come in, he is not entitled to another year's rent out of it, though it be due; because it is his own laches, if he let more than one year's rent run in arrears. Dod v. Saxby, 2 Str. 1024.

The landlord is not entitled to rent not due at the time of the taking of the goods, nor

to that which becomes due while the sheriff remains in possession, unless the sheriff

remains in possession beyond a reasonable time, so as to injure his rights; when he may maintain an action on the case. Hoskins v. Knight, 1 M. & S. 245.

If the rent is not paid to the landlord by the sheriff he must quit, and if he does not, a special action on the case lies sgainst him, after notice of the rent due; or the landlord may move the Court that proceeds of the goods may be given up to him. Henckett v. Kimpson, 2 Wils. 140. But he cannot maintain an action for money had and received. Green v. Austin, 260. And in Smith v. Russell, 3 Taunt. 398, it was held, that the landlord was bound to give notice to the sheriff that the rent was due. If the landlord accepts an undertaking from the sheriff's officer to pay the rent, and suffer him to remove the goods, the landlord cannot maintain an action on the statute, though the undertaking be not valid, from not expressing the consideration. Rothery v. Wood and Another, 3 Camp. 24. And such an undertaking is not within the stat. of frauds. 3 Esp. 66.

*DOLMAN v. ORCHARD, TRISTON, and BINNS, Gents., three, &c. [*104

An indorsee of a bill of exchange cannot recover against acceptors of a bill accepted by one who was formerly a partner, if such person had ceased to be a partner at the time of the accepting of the bill, even though the bill was accepted for a partnership debt, unless the person still held himself out to the world as a partner, as if he allowed his name to remain on the door of the house of business, or the like.

If one of the partners gave notice to a witness that they had ceased to be partners, that might be evidence for the defendants, but a conversation between the witness and one

of the defendants, in which he so stated, is clearly not so.

Assumpsit by the plaintiff as indorsee of a bill of exchange, against the defendants, as acceptors. The bill was dated February 23d, 1825, and drawn by Mr. Thomas Young, at one month after date, and addressed to Messrs. Orchard, Triston & Co. It was accepted "James Orchard." The defendant Orchard, had let judgment go by default. The real question was, whether the defendant Binns was liable, on this acceptance. For the plaintiff, it appeared, that all the three defendants had been partners, carrying on the business of attornies, and that the names of all three were upon the office-door, so late as January, 1825; and the person who presented the bill for acceptance believed the names remained at that time.

The plaintiff's counsel offered evidence of the bill being accepted for goods

sold to all the three jointly.

ABBOTT, C. J. That is not evidence in an action by an indorseo; because, to support this action, the defendants must have been partners at the time of the acceptance.

Evidence was then given, that they had sent in a joint bill to a client, in which was included a charge of 5s., and of 13s. 4d. for business done after

the time of the acceptance.

Scarlett, for the defendants, wished to ask one of the plaintiff's witnesses, whether he had not been told by the defendant Binns, at a time long antecedent to this acceptance, that he had ceased to be a partner.

Abbott, C. J. What he said cannot be evidence for himself.

Scarlett. I submit, that what each partner said is evidence in this way. If

*105] he told the witnesses that they were *not partners, that would be proof that they did not hold themselves out to the world as partners.

ABBOTT, C. J. If they gave notice to the witnesses that they were not partners, that might be evidence; but the conversation of one of them, in which he stated that, is certainly not so.

The defence was, that Mr. Binns had ceased to be a partner several months before the acceptance; and some evidence was given to show that his name was not on the office-door at that time.

ABBOTT, C. J. The question in this case is, whether Mr. Binns was a partner at the time of the accepting of this bill; or whether, having been previously a partner, he had, by his acts, given the world reason to believe that he was still a partner. At an antecedent period he was admitted to be so; but though this bill was accepted for a partnership debt, yet he will not be liable on this acceptance, unless he was a partner at the time of the acceptance being given, or unless he so conducted himself as to induce the world to believe that he was still in partnership with the other defendants. A bill of fees, containing two charges as late as the month of March, has been put in, for the purpose of showing him to be a partner down to that time; but as they are of two very small sums for business done in causes commenced at a period of time when he was a partner, very little reliance can be placed on them, especially as the bulk of the bill is for business of a much earlier date. To show that he held himself out to the world as a partner, evidence has been adduced to show that his name was continued painted on the office-door as late as January or February. If the name was continued over the door, that was certainly inducing persons to believe that he continued a partner; and therefore the questions of fact in this case are two; First, Had Mr. Binns actually ceased to be a partner at the time of the accepting of this bill? *And Second, if he had, whether he held himself out as a partner, by suffering his name to remain on the office-door? If either of these questions be found in the affirmative, the plaintiff is entitled to recover.

Verdict for the defendant Binns, and against the other defend-

ants for the amount of the bill and interest.

Comyn, for the plaintiffs. Scarlett, for the defendant.

[Attornies-J. Searle, and Binns.]

See the case of Newsome v. Coles, 2 Camp. 617 & 620, (n.) Wrightson v. Pullan, 1 Stark. 375, and the cases there cited. And Lloyd v. Ashby, post.

CHADWICK v. BUNNING.

In an action for an apothecary's bill, it is necessary, since the stat. 6 Geo. 4, c. 1, s. 3, to prove that the seal affixed to a certificate to practise as an apothecary is the common seal of the Apothecaries' Company.

An apothecary is entitled to recover for business done in London, if he had a general cer-

An spothecary is entitled to recover for business done in *London*, if he had a general certificate from the *Apothecaries' Company* of his fitness to practise, although he paid but 61.6s. on his obtaining it.

Assumpsit for an apothecary's bill. Plea-General issue.

It was proved that the business was done, and that the charges were reasonable.

Russel.—I am afraid your Lordship will hold, that since the passing of the

act, 6 Geo. 4, c. 133, the plaintiff must give evidence that the seal attached to his certificate is the common seal of the Apothecaries' Company.

Abbott, C. J. I think you must prove it to be the common seal.

*The beadle of the Company proved that it was their common seal, and that 61. 6s. had been paid for the certificate, and the certificate was read: it was dated October 14, 1819, and was a general certificate of the fitness of the plaintiff to practise as an apothecary, without containing any restriction as to place; but on it was indorsed a receipt for 41. 4s., paid to the company, for a permission for the plaintiff to practise in London, but this was paid in the month of June last, which was since the action was brought. The business appeared to have been all done in London.

Scarlett, for the defendant, contended, that under these circumstances the plaintiff was not entitled to recover; for, by the 19th section of the stat. 55 G. 3, c. 194, it is enacted, that ten pounds ten shillings shall be paid for the certificate, by every person intending to practise in London, or within ten miles, and six pounds six shillings by every one intending to practise in any other place but London. Now, for the certificate taken out by the plaintiff he had paid 61. 6s., which allowed him only to practise in the country. It was certainly proved that since the action he had paid the other 41. 4s., which he might do under the latter part of the 19th section of the act, to allow him to practise in London, but that was done too late to entitle him to recover.

Abbott, C. J. The prohibition in the 19th section against apothecaries, who have obtained their certificates, *practising in London, is as to any person who has "obtained a certificate to practise as an apothecary in any other part of England or Wales, except the city of London," and within ten miles. Now that appears to contemplate certificates for the country only; but this certificate is perfectly general, it certifies the plaintiff's fitness to practise without any regard to place. It is certainly shown that he paid but six guineas for it; but the words of the act are, "No person having obtained a certificate to practise in any other part of England or Wales, except London, &c., shall be entitled to practise" in town. Now the plaintiff had not a certificate in that limited way, but a general certificate, that he is entitled ω practise everywhere; and I think, therefore, that he is entitled to recover.

Verdict for the plaintiff—Damages, 11. 13s.

† The stat. of 6 Geo. 4, chap. 133, s. 7, after reciting 'that the authenticating the certificates of qualification of such persons as have been or shall be examined by the Court of examiners, in pursuance of the aforesaid act, has been attended with considerable expense, and might often be difficult of proof, if such certificates were required to be authenticated in different parts of England at the same time in different actions' enacts, "That from and after the passing of this act, the common seal of the said society of the art and mystery of apothecaries of the city of London, shall be deemed to be and shall be received in every Court of law or equity in any part of Engiznd or Wales, as sufficient proof of the authenticity of the certificate to which such seal shall be affixed, and that the person therein named is duly qualified to practise as an apothecary in any part of England or R'ales."

1 By the stat. 55 Geo. 3. c. 194. s. 19, it is enacted, "That the sum of ten pounds len

shillings shall be paid to the said master, wardens, and society of apothecaries, for every such certificate as aforesaid, on obtaining the same, by every person intending to practise as an apothecary within the city of *London*, the liberties or suburbs thereof, or within ten miles of the same city; and the sum of six pounds six shillings by every person intending to practise as an apothecary in any other part of England or Wales; (except the said city of London, the liberties or suburbs thereof, or within ten miles of the said city;) and no person having obtained a certificate to practise as an apothecary in any other part of England or Wales. (except the said city of London, the liberties or suburbs thereof, or within ten miles of the said city as aforesaid.) shall be entitled to practise within the said city of London, the liberties or suburbs thereof, or within ten miles of the said city, unless and until he shall have paid to the said master, wardens, and society, the further sum of four pounds four shillings in addition to the said sum of six pounds six shillings so paid by him as aforesaid, and shall have had endorsed on his said certificate, a receipt from the said master, wardens, and society, for such additional sum of four pounds four shillings; and the sum of two pounds two shillings by every assistant; and the several sums of money arising from the granting of such certificates shall be applied in manner hereinafter directed." *His Lordship gave Scarkett leave to move to enter a nonsuit on this latter point, if the Court above should entertain a different opinion.

Russell, and hyan, for the plaintiff. Scarlett, for the defendant.

[Attornies-Friewell, and Caston.]

DIXON v. DEVERIDGE.

Assumpsit for goods sold. If a defendant say that he owes the debt, and that the plaintiff has applied to him to pay him, and that he will do so as soon as he can, but does not mention any sum. On evidence of this the plaintiff is entitled to a verdict, with nominal damages.

Assumpsir for goods sold. Plea-General issue. The cause was undefended.

A witness was called, who proved that he had had a conversation with the defendant, in which the defendant stated that the plaintiff had sent him a letter asking for payment, and as he justly owed it, he would pay as soon as he could. No notice had been given to the defendant to produce the letter, and no evidence of the amount due could be given.

ABBOTT, C. J. As no evidence is given of the amount of the debt, the jury cannot know how much to find a verdict for; but as the defendant, by this conversation, admits something to be due, the plaintiff is entitled to nominal damages.

Verdict for the plaintiff-Damages, 1s.

Kelly, for the plaintiff.

*1107

[Attornies—Farden, and Norton.]

*TOWSON v. GREEN, DAVIES, and MIERS.

To support a plea that the trustees under a private act of Parliament did not "allow or permit" the defendant to have the exclusive privilege of collecting dust and ashes in a certain place, it is necessary to prove some positive act of obstruction on their part; and it is not enough to prove that a third party took it away, having a right to it.

And it seems that this fact is no answer to an action on a written contract to pay a certain sum for the dust of a parish, but the party must seek relief in Equity.

DEET on bond for the performance of a contract, dated July 18, 1823, made between the defendant Miers (the other defendants being his sureties) and the trustees for cleansing and lighting the parish of St. George, in the county of Middlesex, (acting under a private act of Parliament, of the '6 Geo. 3,) by which the defendant Miers, "in consideration of being allowed the exclusive privilege of collecting the dust, einders, &c., of the said parish, within such parts of the said parish as were not within the liberty of the Tower of London,"

agreed to pay 450l. a-year for the same. The declaration proceeded to aver the execution of the contract, and that the trustees did "allow and permit to the defendant the exclusive privilege, &c.," and stated, that, in breach of the contract, he had refused to pay 112l. 10s., part of the 450l.

Pleas—1st. General issue: 2d. That the trustees did not allow or permit Miers the exclusive privilege of collecting, &c., the dust, cinders, &c., of the

said parish, except as in the agreement excepted.

The plaintiff was clerk to the trustees, who acted under a private act of Parliament, of the 46 Geo. 3, c. 77; by the 9th section of which they are empowered to sue and be sued by their clerk. The contract and bond were

put in, and were in the terms stated in the declaration.

The defendant's counsel opened that a part of the Commercial Road, to the extent of one hundred and thirty-eight houses, was situate within that part of the parish of St. George, which was not within the liberty of the Tower, and that by a private act of Parliament of the 42 Geo. 3, c. 101, s. 104, for lighting and cleansing the Commercial Road, it was enacted, that the trustees of that road might contract for the cleansing it, and all places within one hundred feet of it; and that the person so contracting should have the dust, ashes, &c., from all houses, &c., within those limits; and the private *act of 5 Geo. 4, c. 144, confirmed that enactment as to the Commercial Road; and in fact the defendant Miers could not obtain the dust, ashes, &c., from that part of the Commercial Road, these being held by the person contracting with the Commercial Road trustees. They therefore argued that this was exactly like the case of a landlord, who, if he lets to a tenant, and it appear that the tenant is evicted from any part of the premises, the landlord cannot recover the rent. Abbott, C. J. You do not state that in your plea; you do not plead that

ABBOTT, C. J. You do not state that in your plea; you do not plead that you were evicted; but you plead that the trustees did not "permit and suffer" you to have the dust; now that implies some positive act of obstruction on their part. I doubt whether on these facts the defendant could have framed any defence upon this record, that would be an answer to this action; but that he may not have to go into equity for relief, I should recommend a reference.

Verdict for the plaintiff.—Damages 1101., subject to a reference as to the amount to be deducted for the Commercial Road.

Gurney, and Richards, for the plaintiff. Scarlett, and Holt, for the defendants.

[Attornies-Townson, and May, Senr.]

*ADJOURNED SITTINGS IN LONDON, AFTER MICHAEL [*113 MAS TERM, 1825.

POPE, Assignee of DIXON, v. MONK.

If a debtor to a bankrupt's estate, on being applied to by a person whom he knows to be the collector of debts for the assignee, says, "I will call and pay the money," such promise is an admission of the right of the assignee, and renders it unnecessary in an action for the money, to give the usual proofs in support of the commission.

Assumers for goods sold by the bankrupt to the defendant.

The collector appointed by the assignee to get in the debts due to the bank-

rupt's estate, proved that he made a demand on the defendant for 81. 17s. 3d.; and it appeared from the evidence that the defendant knew that he came from the assignee. The defendant, in answer to the application, said, "I will call and pay the money."

Thessiger, for the defendant. Does your Lordship think that this dispenses with proof of the petitioning creditor's debt, and the other steps necessary to

support the commission?

ABBOTT, C. J. No doubt it does. He is called on to pay to the assignee, and his answer is, that he will.

Verdict for the plaintiff.—Damages, 81. 17s. 3d.

Gurney, and F. Pollock, for the plaintiff.

Thessiger, for the defendant.

[Attornies—Pope & B., and Platts.]

*MONTRIOU, Gent., v. JEFFERYS.

An attorney is not to lose the amount of his bill, on account of an error in the execution of his duty, being such an error as a cautious man might fall into; but if the charges contained in his bill are brought upon his client by his inadvertence, he cannot recover them in an action.

Assumpsit on an attorney's bill. Plea—The general issue.

The plaintiff, Mr. Montriou, happening to be in Suffolk in the month of November, 1821, was applied to on a Saturday by the defendant, and several other farmers, to attend for them before two magistrates on the following Monday, they having been summoned for non-payment of tithes. They said they relied on a modus. He told them it was impossible to find out evidence before the Monday, and as he was obliged to go to London, it was arranged that he should instruct a Mr. King, an attorney of the neighborhood, who was also clerk to the magistrates, to act as his agent, and attend for them, and request that the case might be put off for two or three days. The parties were also told, that it would not be necessary for them all personally to attend. Accordingly, on the Monday, the magistrates were requested to put off the hearing, which they would have done if the lessee of the tithes had consented; but he would not do so, unless some expenses were paid; which proposition such of the parties as were present refused to accede to. The case went on, and no defence being made, the tithes were ordered to be paid. Mr. Montriou returned into the country in the following week, and applied to the magistrates, who expressed a willingness, if they could, to alter their decision; but the lessee of the tithe in whose favor the order had been made, refused to give his consent that the case should be opened again, and the matter remained as it was. Mr. Montriou then advised the parties to appeal to the sessions—they all did so. When the appeals came on to be heard, the magistrates at the sessions said, that as the order had been obtained without the defendants going into their case as they ought to have done, or showing to the two justices at the time that the question was of such a nature that they could not entertain it, they would not allow the lessee *of the tithes then to be taken by surprise by the production of a new case. They, however, stated the circumstances for the opinion of the Court of King's Bench, and that Court confirmed their decision.

It appeared that at the hearing on the Monday, the two justices were informed

that the defence set up was a modus, and that the parties were not prepared to give any specific evidence of it: but Mr. King, who was examined as a witness, admitted on his cross-examination, that he did not previously prepare any bond or any formal notice of the nature of the defence, although it was in evidence, that the statute 7 & 8 Wm. 3, c. 6, which requires such steps to be taken, had been perused by Mr. M. and himself. But, a bond and notice were afterwards prepared.

It appeared, however, that Mr. Montriou had, in his bill for the appeals, charged much less than the ordinary charges, in all the cases except that of the defendant, which was to have been heard the first; and that he had offered, under the circumstances, to make some deduction from his

whole account against all the parties.

Marrynt, for the defendant, contended, that the plaintiff was not entitled to recover, inasmuch as the defendant had been obliged to pay, in consequence of Mr. Montriou or his agent not having prepared the proper bond or notice under the statute, which they ought to have done, as they knew that the objection to the claim was made on the ground of a nodus. He also argued, that a person employed in the legal as well as the medical profession, is bound to bring a reasonable degree of skill and care into the cases that he has to manage, which this plaintiff he contended had not done. The plaintiff should not have handed the parties over to another attorney, and especially to one who was the clerk to the magistrates.

ABBOTT, C. J., in his summing up, observed—According to the evidence in this case, it appears that Mr. King informed the magistrates that the defence was a modus, and that he was not prepared at that time to establish it. The magistrates would have adjourned the case, if the claimant would have consented; but he would not without the payment of a sum of money by the defendants, which such of them as were present did not think it right to pay. An appeal was then recommended by Mr. Montriou, but the sessions thought that they ought not to enter into it, under the circumstances. And I think nobody can doubt the propriety of their opinion; for an appeal is against the decision of a Court pronounced after a hearing, and a party is not to decline giving evidence in the first instance, and afterwards, on an appeal, produce his whole case. The question upon which the verdict will turn is, whether the *expenses were incurred by the inadvertence of the plaintiff; for if he did not in the first instance give proper advice, or did not afterwards conduct the business properly, he is not entitled to recover. King says, that he and Montriou looked into the act of parliament, and were aware that under its provisions they were to inform the justices, and give security if they relied on a modus. And if they had done so, the jurisdiction of the justices would have been at an end, for it never could be intended by the legislature that magistrates should decide such a question, unless both parties should think fit. It does not appear that any advice was given as to the notice and security.

[†] By the stat. 7 & 8 W. 3, c. 6, s. 8, it is enacted, "that where any person or persons complained of for subtracting or withholding any small tithes. &c., shall, before the justices of the peace to whom such complaint is made, insist upon any prescription, composition, or modus decimandi, agreement, or title, whereby he or she is or ought to be freed from payment of the said tithes or other dues in question, and deliver the same in writing to the said justices of the peace, subscribed by him or her, and shall then give to the party complaining reasonable and sufficient security, to the satisfaction of the eaid justices, to pay all such costs and damages as, upon a trial at law to be had for that purpose in any of his Majesty's Courts, having cognizance of that matter, shall be given against him, her, or them, in case the said prescription, composition, or modus decimandi shall not, upon the said trial, be allowed; that in that case the said justices of the peace shall forbest to give any judgment in the matter, and that then and in such case the person or persons so complaining, shall and may be at liberty to prosecute such person or persons for their said subtraction, in any other court or courts whatsoever; where he, she, or they might have sued before the making of this act, any thing in this act to the contrary notwithstanding." The stat. 53 Geo. 3, c. 127, which enlarges the jurisdiction of justices, giving them cognizance of claims to tithes not exceeding ten pounds in value, does not affect this point.

King before the justices said, that the defendants' objection was a modus, and that he was not prepared to go into it, or to give in a specific account of it. It is not on this evidence made out to my mind with any degree of satisfaction, that the parties intended to give security, and withdraw the case from the consideration of the magistrates. In one of the items in the bill it is said, "we sdrised you to resist the demand on the ground of a good modus." It is not said to withdraw the case from the magistrates. In the bill also, the items for the bond and notice are before the 5th November, and the witness says that they were not prepared till after. The real question upon this evidence is, whether you think that the expense was brought on the parties by the inadvertence of the plaintiff? No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into: but if you think, in this case, that the plaintiff has brought all the expense on the parties by his omitting to give proper information either to them or the justices, you will, under that impression, find vour verdict for the defendant.

Scarlett, for the plaintiff, then elected to be

Nonsuited.

*Scarlett, and Storks, for the plaintiff. •117] Marryat, for the defendant.

[Attornies-W. Montriou, and Stevens.]

In the case of Templer, one, &c., v. M'Lachlan, 2 N. R. 136, it was laid down as clear In the case of Tempter, one, e.c., v. M. Lacatan, 2 N. K. 136, it was laid down as clear law, that negligence cannot be set up as a defence to an action for an attorney's bill, but the party must bring an action for the negligence. However, Manafeld. C. J., said, "I do not go the length of saying, that in no case of this kind can negligence in the party suing be used as a defence to the action, though I think it can only be used where the negligence has been such, that the party for whom the work was done, has thereby lost all possibility of benefit from it."

In the case of Farasmorth v. Garrard, 1 Camp. 38, which was an action on a quantum mermit by a builder; Lord Ellemborough said, "the plaintiff is to recover what he deserves. merail by a builder; Lord Ellenborough said, "the plaintiff is to recover what he deserves. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. The late Mr. Justice Buller thought, and I, in deference to so great an authority, have at times ruled the same way; that in cases of this kind, a cross action for negligence was necessary; but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject, and I now consider this as the correct rule: That if there has been no beneficial service, there sow consider (a)s as the correct rule: I hat it there has been no benencial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit." And in the case of Denew v. Daverell, Esq., 3 Camp. 452, which was an action on a quantum meruit by an auctioneer, Lord Ellenborough said, that "where there is a special contract for a stipu lated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross action for any negligence he complains of: but when the plaintiff defendant to his cross action for any negligence he complains of; but when the plaintiff proceeds, as here, upon a quantum meruit. I have no doubt that the just value of his services may be appreciated; and that, if they are found to have been wholly abortive, he is entitled to recover no compensation." See, also, the case of Moneypenny v. Hartland and Others, ante, vol. 1, p. 352, and Hamond v. Holiday, ante, vol. 1, p. 384.

*TOWNSEND v. CARPENTER, Gent., one, &c.

A sheriff's officer can recover caption fees, by an action against the plaintiff's attorney, who caused the warrants from the sheriff's office to be directed to him, it being proved that the master will allow the caption fee in taxing costs, and that it is always paid by the plaintiff's attorney, notwithstanding the provisions of the stat. 23 Hes. 6, c, 9.

Assumpsit by the plaintiff, a sheriff's officer of the county of Surrey, against the defendant, an attorney, for 2l. 12s. 6d. for caption fees, for arresting several persons on writs sued out by the defendant, as attorney for different plaintiffs.

A witness from the sheriff's office produced the writs in the different cases, and the warrants granted thereon to the plaintiff to arrest the defendants named in them. It was proved by the person who produced the writs, that the defendant left them at the sheriff's office, and by other witnesses, that the plaintiff arrested the parties.

ABBOTT, C. J. By an act of parliament, the officer is only to have a see of 4d. for every arrest. Is there any authority to show that I can direct the jury

to give him more?

Chitty. I believe, my lord, that there is no such authority to be found; but I can adduce proof that the master allows half a guinea as a caption fee, if the arrest is in town, and one guinea if out of town; and also, that it is uniformly paid to the officer by the plaintiff's attorney.

This evidence was given.

ABBOTT, C. J. As it is proved that the master will allow the sums claimed on taxation, and that the attorney always pays them; I think the jury may find for the plaintiff.

Verdict for the plaintiff—Damages, 2l. 12s. 6d.

Chitty, for the plaintiff.

[Attornies—Cole, and Carpenter.]

By the stat. 23 Hen. 6, c. 9, it is enacted, that "no sheriffs, under sheriffs, and officers, shall take of any person by them, or any of "them arrested or attached, any fee, &c... (*119 but such as follow, that is to say, for the sheriff twenty pence. The balliff which maketh the arrest or attachment, four pence, and the jailer, if the prisoner be committed to his ward, four pence."

But in the case of Martin v. Slade, 2 N. R. 59, which was an action against a sheriff's officer, on the stat. 32 Geo. 2, c. 23, for taking a larger fee than allowed by law, it appeared that the officer had taken one guinea—and the Court being "clearly of opinion, that the regulations of the statute of H. 6, could not now be considered as giving the rule for the amount of the fees to be taken;" held it to be incumbent on the plaintiff to give some evidence that more had been taken than by law was allowed.

BULLOCK v. LLOYD.

If the indorser of a dishonored bill promise the indorsee, that if he will sue the acceptor, he (the indorser) will pay the law expenses. To entitle the indorsee to recover, on this promise, the amount of his attorney's bill on suing the acceptor, it is not necessary for him to prove that he paid the attorney, his being liable to do so is sufficient.

The declaration stated, that the plaintiff was the indorsee of a bill of exchange, of which the defendant was the indorser; and that, in consideration that the plaintiff would sue one *Wildey*, who was the acceptor, the defendant would

indemnify him for the costs expended in his so doing. There was a count on the bill, and also the money counts. Plea—General issue.

It appeared, that as soon as the bill had been dishonored, the plaintiff returned it to the defendant, who, instead of taking it up, promised to pay any costs the plaintiff might incur, if he would sue the acceptor. The plaintiff did so, and obtained a part of the amount of the bill from the acceptor, but the acceptor being taken on a capias ad satisfaciendum for the residue, a sum of 7l. 14s. was left due on the bill; and the plaintiff's attorney proved that the costs of that action were taxed by the master at 16l. 15s. 4d.

Lawes, for the defendant, contended, that the plaintiff could not recover those costs, for there was no evidence that he had paid them to his attorney, and till

he had so done, he ought not to call on the defendant to pay him.

*ABBOTT, C. J. It has been objected, that there is no proof that the plaintiff has actually paid his attorney the costs; but I do not think that is necessary; for if one at the desire of another commence an action for his benefit, the person so commencing it, is liable to the attorney for the costs; and he may, therefore, maintain an action on an indemnity like the present, although he does not show that he has actually paid the money.

Verdict for the plaintiff for his whole claim.

Scarlett, and Campbell, for the plaintiff. Lawes, for the defendant.

[Attornies-Fitch, and Mowbray.]

NIAS v. NICHOLSON.

If an insolvent in his schedule describe a bill of exchange as in the hands of D, that is sufficient to discharge him from his liability, although D, may have indorsed it over. And if he state it in his schedule as drawn by himself on M, whereas it was drawn by M, on him, it will be for the jury to say, whether they are satisfied that the same bill was meant; and whether, if it was, they think the mis-description was by mistake or with intent to mislead or deceive any one. For if they think the same bill was meant, and that the mis-description was by mistake, it is a good discharge.

Assument against the defendant as acceptor of a bill of exchange, drawn by one Andrew Mitchel, payable to his own order, and by him indorsed to a person named Dandridge, by whom it had been indorsed to one Wilson, who had indorsed it to the plaintiff. Pleas—First. The general issue; and Second. That the defendant was duly discharged under the act for the relief of insolvent debtors.

The question was, whether this bill was so described in the defendant's schedule, as to operate in his favor as a discharge from liability on it?

The defendant's schedule described certain bills thus: Three bills drawn by William Nicholson, on Andrew Mitchel,—of the date of 23d of January, 1824, for 50l. each—and the schedule stated Dandridge to be the creditor on these bills.

Chitty, for the defendant, argued on the authority of the *case of Forman v. Drew, 4 B. & C. 15, and 6 Dow. & Ry. 75, that this was a sufficient discharge under the Insolvent Debtors' act as to this bill. The bill was certainly stated to be in the hands of Dandridge; but, as his indorsing it over must be without the knowledge of the defendant, that description must be taken to be sufficient. It was true, that the schedule stated that this bill (with others) was drawn by Nicholson on Mitchel; whereas it was in truth drawn

by Mitchel on Nicholson; but that was an evident mistake, and, therefore, ought not to prejudice the party, as it would be proved that there was no other bill which could at all answer the description of the three bills, but this and the others given with it.

For the defendant, it was proved by Mitchel, that there had been bill transactions between Nicholson and himself, but no bill for 50l. drawn by Nicholson on him; and it was proved by Dandridge, that he had never had any bill

drawn by Nicholson on Mitchel.

Scarlett, in reply, contended, that the jury ought to presume that, as there were bill transactions between the parties, other bills had been drawn, answer-

ing the description of the schedule.

ABBOTT, C. J., in summing up to the jury, said—The Insolvent Debtors' Act requires the debtor to present a schedule, designating the debtors against whose debts he seeks to be discharged; but as in the case of bills, they may be indorsed over without his knowledge, and therefore he may not know the actual holders, it is sufficient that he describe the bill so as to show what bill it is, and through whom it has passed. As to the description in the schedule, it appears, that this bill corresponds in date, in amount, and in every other respect with one of the bills there described, except that in the schedule it is said to be drawn by Nicholson on Mitchel, instead of its being stated to be drawn by Mitchel on Nicholson. Under these *circumstances, I shall leave the case to you (the jury) in this way.—If you think that the bill mentioned in the schedule is intended and meant for this same bill, and that the mis-description is a mistake and not intended to deceive any one, then the verdict ought to be for the defendant; but if you think that this was not the bill meant, or that if it was the bill meant, the change in the description was made to deceive or defraud any one, then the verdict should be for the plaintiff.

Verdict for the defendant.

Scarlett, and Dowling, for the plaintiff. Chitty, for the defendant.

[Attornies—Dickenson, and In person.]

By the insolvent debtors' act, I Geo. 4, c. 119, s. 6, it is enacted, that the person petitioning for his discharge under the act, shall "deliver into the said [insolvent debtors'] court. a schedule containing a full and true description of all and every person and person an sons to whom such prisoner shall be then indebted, or who to his or her knowledge or belief shall claim to be his or her creditors, together with the nature and amount of such"

debts and claims, respectively.

In the case of Forman and Another v. Drew, above cited, the insolvent had bought coals of the plaintiffn, who traded under the name of the "Argood Coal Company," and the debt due was 821. 2s. 6d. In his schedule, he described the debt as due to Mr. Thomas Webb, who was the agent of the plaintiffs with whom he had corresponded, and he stated the amount to be 821. The Court thought that the insolvent had manifestly shown that he intended fairly to describe the debt; and held this a sufficient compliance with the act.

And in the case of Wood v. Jowet, 4 B. & C. 20, (s.) the Court held, that if the mis-

description of the debt in the schedule was not intended to mislead, nor could have the effect of misleading the creditor, it was sufficient.

The case of Reeves v. Lambert, 4 B. & C. 214, decides, that the description of a bill at in the hands of the person to whom the insolvent paid it is good, though that person had indorsed it over.

*BURWOOD v. KANT.

The messenger under a commission of bankrupt, may recover from the petitioning credit-or his fees for his services, before the party be declared a bankrupt, although the party was duly declared a bankrupt, and the messenger's bill ordered by the commissioners to be paid by the assignee, out of the estate.

Assumest against the defendant, for the plaintiff's charges as the messenger under a commission of bankrupt against John Phillips. The defendant was the petitioning creditor, and also the assignee; and the plaintiff's demand consisted of a sum of 131. 2s. 8d. due to him, as messenger under the commission, before the choice of assignees, and a further sum of 7l. 2s. 6d. due As to the latter sum, no point was raised, but as to the charges due before the choice of assignees, it appeared that they had been duly allowed by the commissioners, and by them ordered to be paid out of the estate.

On this, the plaintiff's counsel argued, that if these charges were not paid out of the estate, the messenger might still recover them against the petitioning creditor.

ABBOTT, C. J. I have some doubt as to how far the defendant, as petitioning creditor, is liable for those charges which are due before the party was declared a bankrupt; because, when any person is so declared, those charges are to be paid out of the estate; though, if he be not declared a bankrupt, the petitioning creditor is the person liable to pay them. It very often happens that the petitioning creditor is not afterwards the assignee, and if the commissioners order these charges to be paid out of the estate, another person (the assignee) has to pay them, and they are to come out of a different fund; but there is no doubt as to the charges after the choice of assignees.

Chitty, amicus curise, reminded his Lordship of the case of Howard and Gibbs's bankruptcy, where 1201. had been recovered against the petitioning

creditor, although they were declared bankrupts.

ABBOTT, C. J. The learned counsel having removed the doubt I had entertained, a verdict may be found as *well for the charges which are before the choice of assignees, as those after.

Verdict for the plaintiff for the whole demand.

[Attornies—Ashley & G., and Bromley.]

In the case of Hartop v. Juckes, 2 M. & S. 438, it was held, that the solicitor to a combission of bankrupt. is not in general liable to an action by the messenger for his fees; but, if he has agreed with the petitioning creditor to work the commission for a certain bum, and has received a great part of the money, the messenger can recover against him.

RAYNER v. LINTHORNE.

A plaintiff cannot sue another for not accepting goods, if the contract note was only signed by the plaintiff; for if the plaintiff acted as a broker, he cannot sue as a principal; and if he were a principal, his signing would not bind the defendant.

Action for not accepting a quantity of tallow, pursuant to contract. Plea— The general issue.

The plaintiff was a Russia broker. A contract note signed by the plaintiff only had been delivered to the defendant-nothing was said at the time of the bargain, as to whether the parties contracted for themselves or others.

Marryat, and F. Pollock, contended, that the plaintiff ought to be nonsuited. The plaintiff either is a principal or a broker. If he is not a principal, he cannot bring the action; and if he is, no contract signed by him only will be binding on us. A seller cannot be agent for a buyer, so as to make a contract binding, within the statute of frauds. There is a case to this effect.†

Gurney, for the plaintiff. Where the principal is not disclosed, the action may be brought by the broker in his own name. The other party may call for the principal or *not. In this case he has not done so. He cited [*125 Atkinson v. Amber, 2 Esp. N. P. C. 493.

ABBOTT, C. J. In the case of Atkinson v. Amber, the goods had been actually delivered, and there was no question upon the statute of frauds. Mr. Marryat puts it this way: if this is a sale, where is the note in writing signed by the defendant under that statute? I think it will not do. I should be sorry to lay down a rule which would countenance the plan of trade that has become so prevalent of selling for an unknown principal; and I think the plaintiff must

Gurney. Does your Lordship think it will make any difference if I show that he had the goods ready for delivery.

ABBOTT, C. J. No, certainly not.

Nonsuit

Gurney, and Comyn, for the plaintiff. Marryat, and F. Pollock, for the defendant.

[Attornies—Thomson, and Cousins & H.]

BRYAN v. WAGSTAFF.

In Error.

Practice.—If a plaintiff in a writ of error, to reverse an outlawry, has assigned as error, that he was beyond sea when the exigent was awarded: and the defendant in error plead, that "he left the realm of his fraud and covin, and to defeat him of his just debt, and for the purpose of avoiding the outlawry;" and on this plea issue be taken; at the trial the defendant in error than the defendant in error plead. the defendant in error begins.

the defendant in error begins.

If on the trial it appear that a suit was commenced against him by original, and instead of giving bail he evades the officer and goes abroad; this is evidence to induce the jury to presume that he went out of the country to avoid the outlawry, because he must be supposed to consider that if he is so sued and does not appear, an outlawry will follow. But if the proceeding against him had been by bill, it would be otherwise.

Whether the plea of the defendant in error be good in law—Quere, and see note, p. 129.

Practice.—If a party to a cause is abroad, but employs an attorney to conduct it, he will be presumed to have left in the hand of these attorney all papers material to the cause;

be presumed to have left in the hands of that attorney all papers material to the cause; and therefore, if on the 13th of December, between the hours of five and six in the afternoon, notice is given to his attorney to produce a paper material to the cause, and the trial comes on on the 15th of *December*, this notice to produce is sufficient; and if the paper be not produced, the other party may give secondary evidence of its contents.

Writ of error to reverse the outlawry of the plaintiff. The error assigned was, that the plaintiff in error, "before and *at the time of the awarding [*126 and issuing the writ of exigi facias, upon which the said outlawry was pronounced, was in parts beyond the sea, to wit, at St. Omer, in the kingdom of France." To this there was a plea, that the plaintiff in error, "before the awarding and issuing the writ of exigi facias, upon which the said outlawry

[†] Champion and Another v. Plummer, 1 N. R. 252.

was pronounced, to wit, on, &c., of his fraud and covin, and in order to defeat the said Daniel Wagstaff of the means of recovering his just debt against him the said J. W. Bryan, and for the purpose of avoiding the said outlawry, when the same should be pronounced, did voluntarily leave the realm of England, and go into parts beyond the seas, and of such his fraud and covin did voluntarily stay and remain in parts beyond the seas from thence, until after the awarding and issuing the said writ of exigi facias, and the pronouncing of out-lawry as aforesaid, and this he is ready to verify." To this plea there was a replication, that the plaintiff in error did not of his fraud and covin, &c., leave the realm, &c., (in the same terms as the plea,) which concluded to the country.

As soon as the cause was called on, Scarlett applied to his Lordship to say,

which side should begin.

ABBOTT, C. J. I think the defendant in error should begin, because the affirmative of the question of fraud lies on him, for the fact of the plaintiff in

error being actually abroad is admitted on the record.

To show that the plaintiff in error went abroad to avoid proceedings against him, the counsel for the defendant in error (who was the plaintiff in the action in which the plaintiff in error had been outlawed) called on the *plaintiff in error, to produce a letter written to him by a clerk of the attorney for the defendant in error, dated September 6th, 1822. The notice to produce it had been served at the office of Mr. Lowe, the attorney for the plaintiff in error, on the 13th of December, between the hours of five and six. (The trial being on the 15th of December.)

Campbell, for the plaintiff in error. This is a notice to produce a letter sent to Mr. Bryan, in September, 1822. I can prove that he is abroad.

A witness was called, who proved that the plaintiff was at St. Omer, and had been there for two years.

When was the notice of trial given? ABBOTT, C. J.

Campbell. On the 9th of November last.

Scarlett. On the question, that this is not a sufficient notice to produce; I must say, that it is the first time that a party's being abroad, was alleged to be a reason why a notice to produce was bad. In this case the party deputes his attorney to act for him, and if it were not so, a man going abroad might avoid producing any document. It is true, that at the assizes, a notice to produce given in the assize town is not sufficient; because it is to be presumed that the party who comes from the country may have left his papers at home.

Campbell, contra. It was held in the case of a captain of a ship, that two days' notice to his attorney to produce a paper was not sufficient, as the captain being on a voyage, might be reasonably supposed to have taken the paper with him. Now, this being a letter written some years ago to the plaintiff in error,

it is not likely to be with the attorney, but with the client.

*Abbott, C. J. I think that a person leaving the country and putting his case into the hands of his attorney, must be taken to leave in his attorney's hands, papers material to the cause; and this letter is most material. If it were not so, a man might, as soon as notice of trial was given, set sail for the East Indies, and the other party must then delay proceeding with his cause till his return, as it might be necessary to give him notice to produce some paper, without which it would be impossible to go on with the cause. I must hold the notice sufficient.

Secondary evidence of the letter was then given.

To show that the plaintiff in error left the kingdom to avoid the process of outlawry—it appeared that a writ of testatum capias was issued against the plaintiff in error into the town of Nottingham, (near which the plaintiff in error lived,) at the suit of the defendant in error. A warrant on this writ was placed in the hands of an officer, on the 28th of September, 1822. 'I he officer could not succeed in arresting the plaintiff in error, but there was a negotiation between the attornies of the plaintiff in error and the defendant in error, relative to bail being put in-however, instead of any bail being put in, the plaintiff in error left the country, and caused all his goods to be sold on the 22d of October, in the same year. A letter of the plaintiff in error, dated October the 15th, 1822, was put in; it gave directions relative to the sale of the goods, and that letters for him should be addressed to "Mrs. Hoare, 46 Ludgate Hill," and it appeared that he went out of the kingdom soon after. The exigent was issued on the 17th of December, 1822, and evidence was given to show, that he left the neighborhood of Nottingham for fear of being arrested.

Campbell, for the plaintiff in error, argued, that the question was not, whether his client left Nottingham to avoid arrests, but whether he left the kingdom to defeat *the outlawry. It was clear that he went away to avoid being arrested, but he could not go to avoid an outlawry, as no proceeding to outlawry had then been commenced; and a going away merely to avoid arrests would not support the plea pleaded. He would observe that the plea was a perfectly new one. No such was ever pleaded before, and it was

contrary to a decision of the Court of Common Pleas.

ABBOTT, C. J. Whether the plea is a good one may be determined in another place: t but what we have now *to consider is, how far this plea is supported. It has been said, that the plaintiff in error did not leave the country to avoid the outlawry, because no proceedings towards an outlawry had then taken place, but that he left the country generally to avoid his creditors. Now, if a party proceed for debt due to him, he may either commence his proceedings by bill or by original. On a proceeding by bill without an original, no outlawry could follow, and if the first proceeding on this case had been a latitat or bill of Middlesex, I should have thought that there was great weight in the objection of Mr. Campbell; but unfortunately for him, the writ in this case was a testatum capias. That is a proceeding by original, and a proceeding on which outlawry might follow. If it had been a proceeding by bill, it might be said, that the plaintiff in error could not have left the country to avoid an outlawry, because no outlawry could follow that mode of proceeding, and there would be great weight in that objection; but as the threatened arrest was by original, the question for you (the jury) to consider is, whether the plaintiff in error might not reasonably expect, that as his creditor (the

† In 2 Roll. Abr. 804, l. 20, it is laid down, that if a man go beyond sea of his own will, or for his pleasure, or for his private business, and exigent is awarded against him, and he is outlawed, he being abroad, this is error. In Carter's case, 2 Roll. Rep. 11, an outlawry was reversed, because the party was beyond sea at the time of the proclamation. In Litt. Ten. s. 437, it is laid down, that if he which is in prison be outlawed in an action of debt or trespass, &c., he shall reverse the outlawry. But on this Lord Coke says, Co. Litt. 259 (b.) "but albeit imprisonment be a good cause to reverse an outlawry, yet it must be by process of law is iswitums, and not by consent or covin; for such imprisonment shall not avoid the outlawry, because upon the matter it is his own act." But the authority bearing directly against the plea in the principal case, is the case of Hesse v. Wood. 4 Taunt. 691, where an outlawry was set aside upon motion, because the party was abroad at the time of the outlawry, although it appeared from affidavits on the other side, that he went abroad to avoid it; and the case was said to be governed by the opinion of Lord Coke before stated; but the Court said, that they had never heard that either the should not reverse an outlawry when he returned.

Outlawry is now considered only as a process to compel appearance; and in general the Court will set it saide on motion, on the defendant paying the costs, and putting the plaintiff in the same situation as if there had been no outlawry.

When a party is outlawed, a special capias utlagatum may be sued out, directing the When a party is outlawed, a special copies utlagatum may be sued out, directing to sheriff to summon a jury, who are to value the defendant's goods and chattels, and lands; but this does not extend to copyhold or trust property. If the jury have undervalued the property, a writ of melius inquirendum may be sued out—and when the sheriff's return has been filed, a transcript is sent to the Exchequer; and out of this court a writ of existing exposus issues to sell the outlaw's goods—a scire facias to recover his debts, and a levari facias to recover the profits of his lands. Though the money so raised belongs to the Crown, if its amount does not exceed 50%, it will be paid to the plaintiff, by order the Court of Exchequer on motion. If it exceeds that your it can be obtained by the of the Court of Exchequer, on motion. If it exceeds that sum, it can be obtained by the plaintiff on petition to the lords of the treasury. For the necessary steps to be taken on such petition, see Tidd. Prac. 135, and the forms there referred to.

defendant in error) had proceeded against him by original, he would follow up his proceedings by an outlawry; and if so, whether the plaintiff in error did not quit the kingdom, as well to avoid such expected outlawry as other arrests. Something has been said of an outlawry being a harsh proceeding, attended with forfeitures and disabilities; but it should be recollected, that an outlawry can always be set "aside on the party doing what is fair, and the king's rights on the outlawry are all instantly waived.

The jury thought that the plaintiff in error did leave the kingdom to avoid the outlawry, as well as to avoid being arrested, and

found a verdict for the defendant in error.

Campbell, and Patieson, for the plaintiff in error. Scarlett, and Chitty, for the defendant in error.

[Attornies-J. H. Lowe, and G. T. & R. Taylor.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Campbell now moved for a new trial, on the ground that there was no direct evidence that the plaintiff in error knew, at the time he left the kingdom, that any proceedings to outlawry were about to be had against him.

BAYLEY, J. He must be taken to expect that the ordinary consequences of

not appearing in a suit by original would follow.

Campbell. But as no outlawry process had issued, he could not have gone away to avoid it.

ABBOTT, C. J. Was it not a question for the jury?

Campbell. My Lord, I cannot complain of the way in which the case was left to the jury.

ABBOTT, C. J. Have you any other argument?

*Campbell then moved to enter up judgment non obstante veredicto, on the ground that if a party be outlawed, and is beyond sea at the time when the exigent is issued, it is error; and that the fact of its being for the purpose of avoiding the outlawry, made no difference. He cited the stat. 26 H. 8, c. 13, 5 & 6 E. 6, c. 11, and 2 Roll. Abr. 804, l. 20; Mathews v. Erbo, 1 Ld. Ray. 349; Hesse v. Wood, 4 Taunt. 691; Co. Litt. 259 (b); Serocold v. Hampsey, 12 East, 624 (n); 1 Wils. 3, and Graham v. Henry, 1 B. & A. 131.

ABBOTT, C. J. Your motion should not be why judgment should not be entered up non obstante veredicto, but why the judgment of outlawry should not be reversed.

The Court granted a rule nisi accordingly.

RIPLEY et al. v. SCAIFE.

By a charter party on a voyage from Liverpool to the West Indie; and from thence to London or Liverpool, it is agreed that a brig "shall be made, and during the voyage kept tight, staunch, &c., at the owner's expense, and that the freighter shall pay freight at the rate of 2001, per month for any time (beyond six months) that she may be exployed; the pay to commence from the day of sailing until her arrival into dock at the homeward port of discharge." The vessel was obliged to remain twenty-eight days at St. Domingo for the purposes of repair, the repairs being done at the expense of the owner.

Held, that during those twenty-eight days, the vessel was employed by the freighter

within the terms of this charter party.

Money had and received. Plea-General issue.

The action was brought to recover back 1841. 2s., paid by the plaintiffs to the defendant, who was part owner of the brig Alliance. This sum was paid by the plaintiffs (under protest) as freight, at the rate of 2001. per month, for twenty-eight days, during which the brig was at St. Domingo, and which was alleged to be due on a charter party, dated June 21st, 1821, by which it was agreed between the defendant, as part owner of the brig Alliance, and the plaintiffs, "that the said brig or vessel shall at the owner's expense be made, and during the voyage shall be kept tight, staunch, and strong, and well found and provided with all things necessary; and shall with all convenient speed be made ready, and receive at Liverpool a *cargo, and proceed to St. Thomas and deliver cargo, &c., and thence proceed to the island of St. [133]
Domingo, as the freighters might direct," &c. (It then proceeded to stipulate for a homeward voyage to Liverpool or London.) "And the freighters agree, that they, their executors, &c., will pay or cause to be paid to the owners of the said brig, their executors, &c., for the freight of the said vessel, at and after the following rate, namely, the sum of 2001., British sterling, per month, for six months certain, and so in proportion for any longer time that she may be employed; the said pay to commence from the 25th day of July next ensuing; or should the vessel sail from Liverpool before that day, then the pay to commence from the day of sailing until her arrival into dock, at the homeward port of discharge.

The brig proceeded on her voyage, and having got on shore at St. Domingo, she was there necessarily detained twenty-eight days, for the purpose of repairing, and finally arrived in Liverpool on the 12th of March, 1822.

The defendant (the owner) was at the expense of the repairs at St. Domingo, and claimed to be paid freight for the twenty-eight days the vessel was under repair at St. Domingo. The sum for those twenty-eight days, being 1841. 22., was paid by the plaintiffs under protest, for the purpose of obtaining the cargo, and the present action was brought to recover back that sum.

(The other parts of the case to which the other counts of the declaration

were applicable, did not involve any point of law.)

The plaintiffs' counsel, on these facts, contended, that the brig, while under repair, could not be considered as *employed* by the freighters; and, therefore,

that this sum was not due for freight.

ABBOTT, C. J. I am of opinion that the construction of the charter party is with the defendant; and that, for the purpose of this charter party, the ship must be *considered as having been employed during the twenty-eight days by the plaintiffs, the freighters.

Verdict for the defendant

Scarlett, and F. Pollock, for the plaintiffs.

The Attorney General, and Campbell, for the defendant.

[Attornies—Reardon & D., and Bouman.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Scarlett now moved for a rule nisi for a new trial, on the ground of misdirection of the Lord Chief Justice, but the Court concurring in the opinion given by his Lordship at the trial, refused the rule.

DOE, on the demise of BARRAUD, Assignee of HAYWARD, a Bankrupt, v. LAWRENCE.

A party, to become bankrupt, must be a trader at the time of the petitioning creditor's debt; but, if that was contracted while he was a trader, and he leave off trade, he may still become a bankrupt.

become a nankrupt.

If one procure orders for goods, having no stock, but buying them from those who have, he making out bills to his customers in his own name, and being himself debited by the person he buys of, this is a trading within the bankrupt laws; but if he procure orders for another, and is by that other person paid a commission, the other person sending the goods to the customers, this was not a trading within the bankrupt laws, antecedent to the stat. 6 Geo. 4, c. 16,

EJECTMENT to recover two houses in *Bread-street*, London. The title to one of the houses was not made out; but the question made was as to the bankruptcy. The commission of bankrupt was dated *April* 8th, 1823. The petitioning creditor's debt was bills, dated *December* 2d, 1822, and accepted by the bankrupt.

Scarlett objected, that, to make this a good petitioning creditor's debt, there ought to be evidence that the bankrupt actually accepted these bills before the bankruptey.

A witness was then called, who proved that he saw the bills with the bankrupt's acceptance on them, within a few days after the time at which they bore date.

*135] *The act of bankruptcy was in *January*, 1823. The bankrupt was by business a land surveyor; and the trading relied on was, that, during the year 1822, the bankrupt got orders for coals from different persons, and that he sold the coals to them with invoices in his own name, he having ordered these coals of the petitioning creditor, from time to time, as he himself got orders for them; but it appeared that the bankrupt had neither wharfs, lighters, nor carts.

Scarlett, for the defendant, contended, that this evidence did not prove a trading at the time of the petitioning creditor's debt; and further, that this was not a trading in coals, as the bankrupt was really only an agent of the coalmerchant, and not a dealer in coals himself.

ABBOTT, C. J. The authorities, I think, go to this:—a party, to become bankrupt, must be a trader at the time of the petitioning creditor's debt; but, if the petitioning creditor's debt accrue during the trading, and the party leave off trade, and then commit an act of bankruptcy, the petitioning creditor may still sue out a commission of bankrupt against him, notwithstanding he has retired from trade. As to the other point, the single question is, whether the bankrupt was a trader at the time of the petitioning creditor's debt. I have learned in this place, that there are many dealers in coals, who have no wharfs, earts, &c., but get orders from persons, and then order the coals from another person, who has wharfs, &c., the middle person being debited by the real merchant, and in return, debiting those who consume them. There is no doubt but this is a buying and selling within the bankrupt laws in the middle mail. But there are also other persons who get orders for coal merchants, and who

in fact, are not debited for the coals, but receive a commission from the coal merchant for the orders they get; and the coal merchant supplies the customer with the coals. This latter is not a trading within *the meaning of the bankrupt laws existing at the time of these transactions.† Which of these two capacities the bankrupt acted in, is material for your (the jury's) consideration; but the petitioning creditor's debt, being for a very large quantity of coals sold to the bankrupt, affords some presumption that he bought coals to sell to others; for if he only got orders, and was to receive a commission, the petitioning creditor would have been debtor to the bankrupt.

Verdict for the lessor of the plaintiff for one of the houses.

Gurney, and Chitty, for the lessor of the plaintiff.

Scarlett, and F. Pollock, for the defendant.

[Attornies—Grimaldi & S. and Green & A.]

† The sixth section of the last bankrupt act, 6 Geo. 4, c. 16, makes some persons liable to the operation of the bankrupt laws, who were not so before; as it enacts "that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody; and persons insuring ships or their freight, or other matter, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels or coffechouses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting on hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt. Provided that no farmer, grazier, commod laborer, or workman for hire, receiver-general of the taxes, or member of, or subscriber to, any incorporated, commercial, or trading companies, established by charter or act of Parliament, shall be deemed as such a trader, liable, by virtue of this act, to become bankrupt."

*BRADFORD v. LEVY.

[*137

If by some mistake of a ship's manifest, a suit is commenced in a foreign port against the captain for a supposed surreptitious landing of a part of his cargo, by which he is delayed in prosecuting his voyage, there being no suit against the ship. This is not a loss for which the underwriters on the ship are liable.

Assumest upon a policy of insurance on the ship *Dove*, bound from *Labrador* to *Oporto*, for an average loss. The loss was stated in the first and second counts, to be by the ship being detained against the will of the owners, and master, and mariners, in the port of *Vigo*, by divers custom-house officers, and certain other persons then acting under the authority of the king of *Spain*; in

other counts, by perils of the seas, and in the others by barratry.

It appeared, that in October, 1822, the ship sailed on this voyage with a cargo of fish, and, in consequence of bad weather, was obliged to put into the port of Corcubion in Spain. The master then went on shore to make out his manifest; and there a mistake was made in the manifest by the omission of seventy quintals of fish, which belonged to the master himself. This was discovered, and a new manifest made out, the former manifest being transmitted to Vigo by the Spanish authorities: the ship proceeded on her voyage, and on the 13th of February, 1819, having sprung a leak, she put into Vigo, and there, from the circumstance of the two manifests being different, the authorities there suspected that he had surreptitiously landed a part of his cargo; and

proceedings were commenced in the court of the first instance, at Vigo, against the captain, on a charge of having surreptitiously landed a part of his cargo: in this suit the captain was condemned; and, in consequence of this, the ship was delayed there from the 15th of February to the 6th of August, 1823; and, by reason of the sentence against the captain, 200l. worth of the fish was seized; but the proceedings were not at all against the ship, but only against the captain personally. This was shown by an examined copy of the decree of that court, which his Lordship held to be evidence to show what the nature of the proceeding was.

ABBOTT, C. J. The case appears to me to stand thus:—In consequence of a mistake in the manifest, the officers at Vigo suspected that the captain had landed a part of his cargo surreptitiously; and a suit is commenced against him, and he is condemned to pay a sum of money. Now, how can this be a loss to affect the underwriters on the ship? I cannot infer fraud in the master without proofs and there were no suit against the ship.

in the master without proof; and there was no suit against the ship.

Abraham cited Carruthers v. Gray, 3 Camp. 142.

Abbott, C. J. There the ship was arrested, and here she was not; which I think makes the whole difference.

Nonsuit.

Marryat, and Abraham, for the plaintiff. Scarlett, and F. Pollock, for the defendant.

[Attornies-H. & E. Willoughby, and J. & S. Pearce.]

The case of Carrathers v. Gray, 3 Camp. 142, was an action on a policy of insurance on goods; and the declaration averred, that the ship with the goods on board, when at Crosstadt, was arrested by the persons exercising the powers of government there, and the goods were then and there, by the said persons seized, detained, and confiscated. The goods, it appeared, were seized by the officers of government there, and never reached the consignor. It was objected, that it was necessary, in support of this averment, to prove that the goods had been confiscated, and to put in a sentence of condemnation. Lord Ellenborough said, that literally, to show confiscation, it would be necessary to prove that the proceeds of the goods came to the treasury of the state; but held that the averment was sufficiently sustained by proof that the goods were forcibly taken possession of by the officers of government.

LLOYD v. ASHBY et al.

Held, that the indersee, for value, of a bill of exchange, cannot maintain an action on a bill accepted by one partner, in a transaction not relating to the partnership, against a secret partner; because such secret partner had neither privity of interest in the bill, not being accepted in a partnership transaction; nor was the bill taken on his credit, as he was not known to be a partner.

Assumpsite against the defendants Ashby, Shaw, and Howell Rowland, on a bill of exchange, dated July 28th, 1824, for 82l. 12s., drawn by Hugh Rowland, and *addressed "Messrs. Ashby & Co.," at three months after date, and payable to the drawer, who had indursed it to the order of the plaintiff. The acceptance on it was "Ashby and Rowland," and was in the handwriting of Howell Rowland, who was the son of the drawer. Howell Rowland had suffered judgment to go by default; and the other defendants pleaded the general issue.

The real question to be tried was, whether Mr. Shaw, who was a dormant partner, was liable on this acceptance. To show him to be a partner with the 2 R

other defendants, an agreement, dated the 24th of June, 1824, between Ashby and Rowland on the one part, and Shaw on the other, was put in; by which it was agreed that Mr. Shaw was to become a partner, and to bring 1500l. into the concern, but that his name should not appear in the firm, but only those of Ashby and Rowland. It was also proved, that the fact of his being a partner was not made known, nor was his name used at all in the transactions of the firm. Mr. Hugh Rowland, the drawer of the bill, had had dealings with a former firm, while Mr. Osborne was a partner in it, (that firm having traded under the name of Ashby & Co.,) and of that firm Ashby and Howell Rowland had agreed to pay the debts; but there had been no dealings of any kind between him and the defendants at any time since Mr. Shaw had become a partner. The plaintiff had taken the bill of the drawer in payment of the price of a steam engine that he had purchased of him, the plaintiff having agreed, before he delivered the steam engine, to take the acceptance of Ashby & Co. in payment, he having, on enquiry, understood it to be a good firm.

Scarlett, for the defendant Shaw. I submit that Mr. Shaw is not liable on this acceptance: he was a sleeping partner, and had advanced 1500L; but his name was neither used, nor even known. I admit that he was liable for the debts of the house; but a dormant partner cannot be bound by transactions not belonging to the firm: he is *only bound on a partnership transaction, he being liable in respect of interest; but if young Mr. Rowland wanted to raise money for his own purposes, Mr. Shaw would not be liable, because he had no interest in the transaction; and he would not be liable in respect of credit being given to him as a partner; because it was unknown that he was The drawer of the bill never dealt with the firm after Mr. Osborne went out, but, having money due to him from "Ashby & Co.," he draws a bill for his debt, and Howell Rowland accepts it. If a man receives a bill from a partnership for a debt due from one or more of the partners, he would not recover against the whole firm; and therefore if Mr. Rowland, senr., had sued, even knowing Mr. Shaw to be a partner, he could not have recovered against him, there being no contract between Shaw and the drawer; and the drawing of a bill in favor of an individual, only transfers the debt to him. And all that was assigned to the plaintiff was the debt due from Ashby & Rowland, junr., to Rowland, senr. If the plaintiff, being the indorsee, had known Shaw to be a partner, and had taken the bill on his credit, I know that Shaw could not have repudiated the transaction; but the plaintiff did not take it on his credit, for he did not know that Shaw was a partner; and if he did not take the bill on Shaw's credit, he only took an assignment of the debt which was due to the drawer. If a stranger to the concern, like the plaintiff, takes the debt of another man, he can only take what that man can give him. This bill is accepted "Ashby & Rowland," but it was for a debt of Ashby & Co. A dormant partner may say he was not interested in the transaction; and, if the plaintiff had asked who "Ashby & Co." were, he would have been told Ashby. Rowland & Osborne; and its being accepted "Ashby & Rowland," makes no difference, as it was only to pay the old debt. The question therefore is, whe ther a dormant partner shall be liable when his name is not used, and *when the acceptance is given for a debt due before he was a partner. [*141

ABBOTT, C. J. If you show that it was given for an old debt, the case of Shireff v. Wilkes, 1 East, 48, is an authority in your favor.

Scarlett. The question then would come to this:—would an acceptance bind a dormant partner, if it were to raise money for the private accommodation of one of the partners? It is proved that Shaw was never a debtor to Rowland, senr.; and therefore he had no right to draw a bill on Shaw, unless the latter had lent his credit, which he has not done. If there were no debt at all, and the money was raised, not for the firm, but for the private accommodation of one of the partners, the dormant partner would not be liable. If A and B. go to a banker's, and give him their draft for the purpose of raising

money, the banker can recover against both; and if C. is a dormant partner, and the money was raised for the firm, C. will be also liable; but if the money was not raised for the firm, C. would not be liable; for I submit that a partner

can only be bound by lending his credit, or by privity of interest.

Marryat, for the plaintiff. The case of Shireff v. Wilkes was that of a person who knew for what the bill was drawn; but no case has decided that a bona fide holder of a bill, who does not know whether it was given for an old debt, or for a debt of the new firm, or for accommodation, is prevented from recovering on it against all the partners, dormant or otherwise. I submit, that it would bind those who were partners at the time of the accepting of the bill. In the case of Swan v. Heald, 7 East, 210, where two partners indorsed a bill for goods purchased by them in one trade, all the partners who traded with them in another were held liable, although one was a dormant partner.

*Scarlett. That case only decides that, being assets of the firm, one

partner might pass it away.

Marryat. In the case of Ridley v. Taylor, 13 East, 175, it was held, that if one partner draw in the name of the firm, it will bind all the partners; although the bill be passed away by one partner in discharge of his own separate debt, unless there be covin proved to exist between that partner and the separate creditor. And I take it, that whenever a bill has got into the hands of an indorsee for value, he may recover on it, although the drawer could not; because the drawer knows for what debt he took it, and he knows what partner he ought to draw on; and a distinction has always been taken between the case of a drawer, and that of a bona fide holder, who is not guilty of covin, and who does not know of any party but the drawer.

ABBOTT, C. J. Was the case of Ridley v. Taylor, the case of an unknown

partner?

Stephen. It was not, my Lord.

ABSOTT, C. J. I must take it, on the evidence, that this bill was accepted either for a debt due before Mr. Shaw became a partner, or for the accommodation of others. If Shaw had been known to be a partner, I should have held that it was taken on his credit; and that, unless there was fraud in the plaintiff, he would be entitled to recover on it against Shaw: but as the plaintiff did not know that Shaw was a partner, and as he could not have taken the bill on Shaw's credit, I am of opinion that the plaintiff cannot recover. I ground myself on these circumstances, that Mr. Shaw was an unknown partner, and that the bill was not accepted for a debt from him, but for the raising of money from which he had no benefit.

Nonsuit.

*Marryat, and Stephen, for the plaintiff.
Scarlett, Gurney, and Tindal, for the defendant Shaw.

[Attornies—Collins, and Sweet & Co.]

· BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J&

In Banc.

Marryat now moved for a rule nisi for a new trial, and argued, that, how ever the drawer could not have recovered against Mr. Shaw on this bill, yet a cona fide holder for value might do so. As the plaintiff was not guitty of colusion, he could have recovered against Mr. Shaw, if he had been an or ensible partner, whether the bill had been accepted for a partnership transaction or not.

This person, it is true, was a dormant partner; but he had never yet heard that a dormant partner, when discovered, was different is point of liability from any other partner.

BAYLEY, J. But this is not a partnership transaction In all partnership

transactions, a dormant partner is liable, no doubt.

Marryat. If I agree to sell goods to A. B., and he is to pay me by the acceptance of C. D., and I deliver the goods and get the acceptance, I am not w inquire whether C. D. get value for the acceptance.

BAYLEY, J. Then you would have taken the bill on the credit of that person. Marryat. But would it not be considered that the bill was taken generally on the credit of the firm, whoever it might consist of. If a man take the acceptance of Messrs. Child & Co., the bankers, there is no doubt, that although there is now in that firm no person of the name of Child, *all the partners of the house would be liable on it, although most, if not all of them, [*144] were unknown at the time of the taking of the bill.

ABBOTT, C. J. This is, no doubt, a case of great importance: you may therefore take a

Rule to show cause.

WOOLEY et al., Assignees of DOWMAN and CFFLEY, Bankrupts, v. JENNINGS et al.

If A. owe B. a sum of money, e. g., 4000l., and give a warrant of attorney to confess judgment for that sum; and after that dealings and payments take place between them to an amount of 20,000l. on each side of the account, but no payment is made specifically in discharge of the warrant of attorney; the creditor may enforce it, though subsequently to its date he received a larger sum than it was given for; for, if the money was not specifically paid in discharge of the warrant of attorney, the creditor might put it in reduction of which of the two accounts he chose.

TROVER for goods and bills of exchange. Plea-General issue.

It appeared that the bankrupts and the defendants having had considerable dealings, and a balance of about 4000l. being due to the defendants, the bankrupts, on the 20th of January, 1823, gave a warrant of attorney to confess a judgment to the defendants. This warrant of attorney was endorsed—

"The within warrant of attorney was given to secure the sum of 4000l.,

with lawful interest thereon."

By a statement of the accounts between the bankrupts and the defendants, which statement was partly in the handwriting of one of the defendants, and contained the whole of their dealings up to September 22d, 1823, it appeared that payments had been made by the bankrupts between the date of the warrant of attorney and the time of making up of the account, to an amount of near 20,000l., but that there were dealings on the other side of the account to near the same amount; and no mention was made of the warrant of attorney. On the face of this statement, a balance of 2409l. 4s. 9d. appeared to be due to the defendants, exclusive *of any sum that might be due on the warrant of attorney. On the 4th of October, 1823, a writ of fieri factas

116 The year and on the 29th October the commission of bankrupt issued. The yearing that had been made.

ABBOTT, C. J. It appears, by this account, that sums very much exceeding 4000l. were paid after the warrant of attorney was given, but that there is nearly as much on the other side of the account. On this, the as-

signees contend, that as soon as a sum of 4000l. was paid, there was an end of the warrant of attorney, it being satisfied. Now, can you, Mr. Attorney General, adduce any evidence that any payment was made specifically to reduce this warrant of attorney.

The Attorney-General. I cannot, my Lord.

ABBOTT, C. J. Then I think that this falls within the general rule of law The payments were made generally; and the receiver put them to the current account. There is no appropriation of the money by the debtor: he leaves it to the creditor to put it in reduction of either debt, and the creditor appropriates

it to the running account.

F. Pollock. The question intended to be raised is, whether there can be a running security given by a trader for his creditor to have immediate execution

for debts that became due afterwards.

ABBOTT, C. J. I am not called upon to decide that abstract proposition. The Attorney-General. They took too much under the execution; as it appears that the real balance was 24091. 4s. 9d., and they levied for 40001. *Abbott, C. J. If they had a right to sue out execution at all, trover is not the proper remedy for their taking too much.

Verdict for the defendant.

The Attorney-General, Gurney, Taunton, and F. Pollock, for the plaintiffs. Scarlett, and Marryat, for the defendants.

[Attornies—J. James, and T. Jones.]

WHITTINGTON v. GLADWIN.

Action lies against a person for saying of an inn and tavern keeper, "you are a pauper, and will be in the bankrupt list in less than twelve months;" and it is not necessary, to support an action for words spoken of a man in his trade, that his trade should be averred in the declaration to be such an one as will make him liable to the bankrupt laws; and proof at the trial that he has once sold spirits to be consumed out of his house, is sufficient proof of his being a trader.

SLANDER.—The declaration stated, that the plaintiff, before and at the time of the committing of the grievances complained of, had been, and that he still was, an inn and tavern keeper, and had always exercised, &c., and still did exercise, &c., the same trade or business with great integrity, &c., and that the defendant, wickedly and maliciously intending to injure him in his good name, fame, and credit, and also to injure him in his said trade or business, in certain discourse, &c., spoke these words :- "You are a pauper: you will be in the bankrupt list in less than twelve months." Plea-General issue. The words were addressed to the plaintiff, in the coffee-room of his own house, and in the presence of several of his neighbors.

One of the witnesses, who proved the speaking of the words, proved also that the plaintiff had sold him a quantity of spirits, to be consumed out of the

house.

ABBOTT, C. J., ruled, that such proof was quite sufficient to show that the plaintiff was a trader liable to the bankrupt laws. His Lordship left the case to the jury, who returned a

Verdict for the plaintiff.—Damages, 101 Scarlett, Brougham, and Payne, for the plaintiff. Marryat, and Ludlow, for the defendant.

[Attornies-Whittington, and Berkeleys.] Vol. XII.—63

WHITTINGTON C. GLADWIN. M. T. 1825. Γ*147 498

In the ensuing Hilary Term, Marryat moved for a rule to show cause why the judgment should not be arrested, on the ground that the averment in the declaration, that the plaintiff was an inn and tavern keeper, was insufficient, as he was not, in either of those capacities, subject to the then bankrupt laws; and the words spoken not being actionable in themselves. It had always been understood, that words importing insolvency, spoken of a man not liable to the bankrupt laws, would not support an action. "To call a man bankrupt generally, no action will lie upon it." 1 Viner's Abridgment, 475. He must carry on trade by buying and selling. And in a case in Siderfiv, 299, judgment was arrested, because it was not averred that the plaintiff got his living by buying and selling. He cited, also, an anonymous case in Bulst. 40; and Collis v. Malin, Cro. Car. 282.†

ABBOTT, C. J. It does not appear to me that the latter case is any authority for the distinction you seek to establish between the case of a man liable to the bankrupt laws, and one who is not so; because, it seems that the plaintiff there was not in any trade at all at the time when the words were spoken. The single question is, whether such words as those complained of, spoken of a man buying liquors and other articles for the entertainment of his customers, may not prejudice him, although he is not liable to the laws respecting bankrupts? May not such a man be as much injured as if he were so liable? According to *all the principles upon which actions for words are [*148

founded. I am of opinion that he may.

BAYLEY, J. On what principle is it that an attorney may bring an action for words charging him with negligence in his profession: is it not this, that it may prevent his being employed? And so an innkeeper may be injured, if you say of him that he is a pauper. Does not saying a man is a pauper import insolvency? You would not go to a pauper's house to get entertainment: you would not expect at the house of such a man to meet with those things which an innkeeper is bound to supply. Whatever hurts a man in his business is actionable. There is a case on the subject, 1 Lord Raymond, 610 ## and it did not appear there that the plaintiff was getting his living by buying and selling.

HOLEOVE and LITTLEDALE, Js., concurred.

Rule refused.

† "Trin. 8 Car. Action for words.—Whereas the plaintiff had used, per magnum tem-T'ITIN. 8 Car. Action for words.—Whereas the plaintiff had used, per magnum tempus, the trade of buying and selling of cattle, and divers times bought upon his credit: that the defendant said of him, Thou art a bankrupt: the defendant pleaded Not Guilty, and found against him; and because he did not say, that he used the trade at the time of the words speaking, but per magnum tempus usus fuit. which may be divers years before: and the action lies not; unless, at the time of speaking the words, he used the trade of buying and selling of cattle: therefore it was adjudged for the defendant."

1. Read v. Hudson. The plaintiff was a laceman: and the question raised there was, whether the action was maintainable for the words as spoken of him in his trade, as the declaration stated them to be spoken "de statu suo," instead of being "arts vel misterio;" and the Court thought it sufficient.

and the Court thought it sufficient.

HANNAFORD v. HUNN, Esq.

Action for false imprisonment brought by a master of a man of war, against his captain.

The defendant pleaded two sets of pleas. The first set stated, that he imprisoned the plaintiff in order to bring him to a court-martial for disobedience of his orders, quar-relling, &c. The second set stated, that the imprisonment took place in consequence

of charges brought against the plaintiff by a superior officer.

The sentence of a court-martial, held to investigate the charges, cannot be received as conclusive evidence on this state of the pleadings, but to make it so, should be pleaded as an esteppel; and it is open to the jury, if they believe that the imprisonment took place on the charges stated in the first sot of pleas, to inquire into the trath of those

charges, notwithstanding the decision of the court-martial upon them.

FALSE imprisonment. The first count of the declaration stated that the defendant, on the 14th of August, 1824, assaulted the plaintiff on board of a certain ship, called *the Tweed, and compelled him to enter a certain small and confined cabin, or room, and there kept him imprisoned, without any reasonable or probable cause, for the space of three days, whereby he suffered much, and was injured greatly in credit, health, &c. There were other counts, charging other similar imprisonments; but the only imprisonments upon which evidence was given were—that stated in the first count, and another, which followed an arrest on the 31st of August.

The defendant pleaded, 1st, the general issue; 2d, that, at the time of the assault, &c., complained of in the first count, he was captain and commander of the Tweed, which was a ship of war, and that the plaintiff, being a person belonging to the fleet, and subject to his command as his superior officer, "did wilfully and unlawfully refuse to obey, and did wilfully and unlawfully disobey a certain lawful command, before then given by him as such officer," contrary to his duty, and in breach of good order and the discipline of the navy, &c.; in consequence of which he, the defendant, put him under arrest, "in order that he might be brought, and until he should be brought, to trial by a court-martial" for his offence.

3d. The defendant pleaded that the cause of the arrest was disobedience by the plaintiff to an order issued by a certain superior officer.

4th. That the plaintiff, having quarrelled with a certain superior officer,

defendant caused him to be imprisoned.

5th. That the plaintiff had behaved with contempt to the defendant. 6th. That he had behaved with contempt to a certain superior officer.

7th. That he had used reproachful and provoking speech and gestures to a certain other person, tending to make a quarrel and disturbance.

8th. That he had made in the log-book an undue, improper, and unauthor-

9th. That he had been guilty of falsehood and prevarication.

*10th. That he had been guilty of an offence against the articles and orders for the better regulation of the navy, cognizable by a court-mar-

tial, but not stating what the offence was.

There was a similar set of pleas to each of the other counts in the declaration. The rest of the pleas stated, in substance, that the defendant arrested the plaintiff in order to bring him to a court-martial, in consequence of certain complaints, charges, and accusations made to the defendant against the plaintiff (for certain offences therein specified) by a superior officer of the plaintiff's. The plaintiff replied, "de injuria sua propria," and new assigned excess. The defendant rejoined, " Not guilty," to the new assignment, and joined issue upon the replication.

The plaintiff was master, and the defendant captain of a ship of war called the Tweed. It appeared, that, on the 13th of August, 1824, the vessel being then at Buhia, the defendant directed the plaintiff to sign a set of orders which he had made for the management of the ship's crew, particularly referring him

to Order 30. The plaintiff, conceiving that some of them were at variance with the printed instructions, which are issued for the regulation of the navy in general, did not feel justified in obeying the defendant's direction, without first remonstrating, which he did by letter in the following terms:—

"His Majesty's Ship Tweed, Bahia.
"August 14th, 1824.

"Sir,—In compliance with your directions, the senior lieutenant, desiring me to peruse the 30th article of your orders issued yesterday, I most respectfully beg to inform you, that I have complied with that order; and I find, upon strict perusal of the 30th order, you refer me to the general printed naval instructions; and, having so done, I find in them nothing to warrant my signing the articles (Numbers 14, 21, and 30) contained in your order-book; and, in corroboration of my statement, I beg *leave to refer you to the articles, Numbers 7.9, and 15 of sect. 1, chap. 1, of general printed naval instructions.

"I am, &c.

c. (Signed) "G. Hannaford."

Shortly after the receipt of this letter by the defendant, the first arrest complained of took place in the presence of the whole ship's company, the defendant reading and observing on the letter written by the plaintiff, and also the articles of war, in a violent and passionate manner. It appeared that, before this time, there had been some disputes between the plaintiff and Lieutenant Kelly, respecting which Lieutenant Kelly had addressed a letter to the defend-The first arrest lasted three days, and ended on the 17th of August; from which time, till the 31st, the plaintiff continued to discharge his duties as On the 31st he was again placed under arrest. The crew were present on the quarter-deck, and the defendant put the order-book into the plaintiff's hand, and told him to go down and sign it. The plaintiff took the book and went down; and, when he returned, he gave the book, signed, to the captain, accompanying the act with a remonstrance against the effect of some of the orders. This second imprisonment lasted forty-one days. At the time of this arrest, the plaintiff was accused by the defendant of falsehood and prevarication, and also of having made some improper alterations in the logbook, varying from the contents of the log-board; but the lieutenant of the watch proved that the alterations accorded with the facts, and that they were made by his direction.† *It appeared also, that the captain had told the plaintiff that he might make what alterations he pleased in the log-book. The arrest, during great part of the time, was what is called close.

The orders of the defendant, particularly referred to in the plaintiff's letter,

and which were given in evidence, were as follow:-

"14th. It having frequently occurred, that serious and unfortunate disputes have arisen between the ships who have embarked specie and the shippers thereof, in consequence of not adopting a cautious and official mode in so doing; it is my direction that the master attend and pay most particular attention to this branch of his duty; and whenever any treasure be brought on board, that he, with the officers of the watch, and the purser, attend in my fore cabin, and there count out every box, or bag, dollar, and coin so received, which he shall describe by number, mark, and contents in the log-book, signed by the officers of the watch; and having so counted and re-packed all such treasures, he is to pay most particular attention to its stowage in such place as shall be pointed out by the commanding officer, and not leave the

[†] Section 6, Chap. 2, Art. 32, p. 193, of the printed naval instructions, under the head of Master, after stating the duty of the master to make entries in the log-book from the log-board; and also of the lieutenants to sign the entries, goes on to say, "after the log-book has been signed by the lieutenants, no alteration, however trifling, is to be made in it, without the approbation of the captain, and the perfect recollection of the lieutenant of the watch, that such alteration is proper."

place until safely and securely lodged, which he is to report to me if on board, or the first lieutenant in my absence."

"21st. Whenever any officer may be desirous of making any official communication with the commander in chief or other public department, it shall be done by letter to me, that I may forward or withhold the same as I shall judge

fit for his majesty's service."

"30th. It is with regret that I advert to the recent perpetual complaints of sn officer against his superior in the execution of his office; and, anxious to terminate, if possible, such conduct without resorting to extremes, I refer that officer to the serious consideration of the articles of war, Nos. 19, 21, 22, and 23, as well as the general printed instructions,—further, he herewith receives my most *positive orders, never, upon any pretence whatsoever, to presume to enter into any altercation again with him upon the quarter-deck; but that he conform to the discipline of the service, and a cautious observance of the 21st article of war, as well as the 13th order, &c., &c., &c.,

The articles in the naval instructions relied on by the plaintiff as his authority for his conduct, and which were also read in evidence, were the fol-

lowing:-

Sect. 1, chap. 1, Art. 7. "If an officer shall observe any misconduct in his superior, or shall suffer any personal oppression, injustice, or other ill treatment, he is not, on that account, to fail in any degree in respect due to such superior officer; but he is to represent such misconduct or ill treatment to the captain of the ship to which he belongs, or to the flag-officer commanding the squadron in which he serves, or to the commander in chief, as circumstances may require."

Art. 9. "If an officer or other person shall have occasion to represent the misconduct of any officer, or shall have cause of complaint, he is to represent it to the captain of the ship to which he belongs; but if the captain shall not attend to his representations, or if the captain be the officer whose misconduct he shall think it necessary to represent, or of whose ill treatment he shall have cause to complain, he is to make his representation to the commander in chief, to the superior officer present, or to the Secretary of the Admiralty, as circumstances may require."

Art. 15. "If an officer shall at any time receive from his superior an order which may be contrary in any respect to any article in these general instructions, or to any particular order he may have received from the Lords Commissioners of the Admiralty, or from any superior officer, he is to represent in writing such contrariety to the officer from whom he shall have received the order; but if after such representation, that officer shall direct him to obey the forder he has given him, he is to obey it, and report the circumstances to the commander in chief, or to the Secretary of the Admiralty, as may be necessary."

It appeared from the evidence, that between the 13th August, when the plaintiff was first required to sign the order-book, but refused, and the 31st, when he did actually sign it, no repetition of the order to sign had been given by the defendant: it was, therefore, contended for the plaintiff, that he had acted properly in the affair, and was not guilty of any breach of his duty.

It did not appear that there was any unnecessary delay in bringing the

plaintiff to trial by the court-martial.

The charges exhibited by the defendant before the court-martial against the plaintiff, were as follow:—

1st Charge. For a breach of the 19th, 22d, and 23d articles of war, on or about the 29th July, and 7th August, by conduct as set forth in Lieutenant Kelly's letter of the latter date.

2d Charge. For behaving to me with disrespect and contempt, on or about the 10th day of August, in declaring that he stood too high on the board

(Navy Board) to be afraid of or hurt by any representation I could make of his conduct.

3d Charge. For disobedience of orders and un-officer-like conduct, between

the 10th day of August, and 29th of the same month.

4th Charge. For making insertions in the log-book relative to me, without my directing him so to do, more particularly on the morning of Sunday, the 29th August; and being guilty of falsehood and prevarication when taxed therewith on the quarter-deck.

As to the first and second charges, the court-martial were of opinion, that they could not decide upon them, inasmuch as the first arrest having been put an end to on *the 17th August, all charges prior to that time were [*155]

done away with.

As to the third and fourth charges, the court were of opinion that they were in part proved, and decided that the plaintiff should be reprimanded, and admo-

nished to be more careful in his behavior in future.

The Attorney General, for the defendant, contended, that although the courtmartial were in error in not deciding on the first and second charges which related to the first arrest; yet as the whole affair had been investigated, and evidence heard on both sides, it was not competent to go into the investigation a second time before a tribunal of a different description. He relied on the sen-

tence of the court as conclusive upon the question.

ABBOTT, C. J. I think, if you mean to say, that you put the plaintiff under arrest in order to bring him to a court-martial, and that you did so bring him, and rely on the sentence of the court-martial as conclusive, you must so plead it, and plead it by way of estoppel. By this form of pleading you consent to bring the question before a jury. The questions are, whether the defendant did put the plaintiff under arrest for the charges alleged in the pleas; and I take it that the truth of those charges is to be inquired of here. One set of pleas justifies the arrest, on the ground of a charge of disobedience made by another officer. And I shall tell the jury, that if they think the arrest took place in consequence of the charges made by Lieutenant Kelly, then they must find their verdict for the defendant: and I shall leave it to them to say, whether it took place for that or for any other cause.

The Attorney General then addressed the jury, and called a witness, whose testimony, though it showed some acts of impropriety on the part of the plain-

tiff, did not materially vary the case as proved by his witnesses.

*Absort. C., J., in his summing up, said—The arrest in this case is what is called close. But I am of opinion, in point of law, that it is in the discretion of the superior officer to say, whether an arrest shall be close or at large. If he put a party under arrest without cause, then the difference is matter of consideration, only with a view to the estimate of damages. Upon this record, I am of opinion, in point of law, that it is left for you to inquire whether the arrest took place on any of the alleged grounds, either in consequence of disobedience to the defendant, or of a charge made by another superior officer. If you think that the cause of arrest was, on both days, the complaint made by Lieutenant Kelly, then you will find for the defendant on those pleas which so state it; but if you think that it was not for that, but for the others, viz., that the plaintiff had in fact disobeyed, quarrelled, &c., then I am of opinion, that you are at liberty to inquire into the truth of the charges made. The letter of the 14th of August, is stated by the defendant to be his ground of arrest in his letter to the Admiral. But I think that he is not to be held strictly to the circumstance of the letter; but if he can show improper conduct before, he is at liberty to take advantage of it. There is no entry in the log-book previous to that time. I think that the letter of remonstrance respecting the signing of the orders, is not an act of disobedience. It is not necessary that I should give any opinion, as to whether any thing in the defendant's order-book was contrary to the printed instructions. I think it was competent to the cap-

min to make the order about the bullion. I think the defendant was justified in asserting that quarrels had taken place, without mentioning the names of the parties: and I think that the order made by the defendant about sending letters through him to the commander-in-chief, is at variance with or at least hardly warranted by the printed instructions; but I do not think it necessary to lay The question as to the first down any positive opinion on the subject. *arrest is, did the plaintiff disobey the captain and refuse to sign the orders! As to the second arrest, I think it seems to have been made in consequence of the entry in the log-book. I find nothing in the printed instructions, which requires the master to confine the entries in the log-book to that which is on the log-board, and I should be greatly surprised if it were so. you shall be of opinion that the first arrest took place on the writing of the letter as to the signing of the orders, and that the writing such letter was not an act of disobedience; and if you shall think that the second arrest was made in continuation of the first, or on account of the insertion in the log-book, or of prevarication and falsehood, and also that the entry was not an unauthorized entry, and that there is no proof of falsehood or prevarication; then in either of these cases you will find your verdict for the plaintiff.

Verdict for the plaintiff—Damages, 300%.

Brougham, Parke, and Pattison, for the plaintiff. The Attorney General, Scarlett, and Maule, for the defendant.

[Attornice-Vincent, and C. Jones.]

The case of Wall v. M'Namara, tried before Lord Manefield at West. Sitt. aft. M. T. 1779, cited in 1 T. R. 536, was an action brought by a captain in the African Corps, against the defendant, who was Lieutenant-Governor of Senegambia, for imprisoning him for nine months at Gambia, under circumstances of cruelty. The defendant pleaded the general issue, intending to justify the imprisonment as under the mutiny act, on the ground of the plaintiff's disobedience of orders. (By the army mutiny acts defendants may give special matter in evidence under the general issue.) The alleged disobedience was, that the plaintiff, being ill, had left his post without leave from his superior. Lord Mansfeld the plaintiff, being ill, had left his post without leave from his superior. Lord Mansfeld said, "In trying the legality of acts done by military officers in the exercise of their duty, also particularly beyond the seas, where cases may occur without the "possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to be upright; it is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There, the principal inquiry to be made is, how the heart stood; and if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, if cruelty, malice and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification, the most technically regular, from that punishment which it is your province and your the most technically regular, from that punishment which it is your province and your duty to inflict in so scandalous an abuse of public trust. It is admitted, that the plaintiff was to blame in leaving his post; but there was no enemy, no mutiny, no danger. His health was declining, and he trusted to the benevolence of the defendant to consider the circumstances under which he acted; but, supposing it to be the defendant's duty to call circumstances under which he acted; but, supposing it to be the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of common air in a sultry climate, and shutting him up in a gloomy prison, where there was no possibility of bringing him to a trial for several months, there not being a sufficient number of officers to form a court-martial; those circumstances, independent of the clearest evidence of malice, as sworn to by one of the witnesses, are sufficient for you to presume a bad malignant motive in the defendant, which would destroy his justification, had it even been within the power delegated to the defendant by his commission." The jury found a verdict for plaintiff, damages, 10001.

In the case of Wardes v. Bailey, 4 Taunt. 67, it was held that an action for false imprisonment lies by an inferior officer against his superior, for an imprisonment for disobedience of an order not within the scope of military authority, although the imprisonment had been followed by a court-martisl. In that case, the law on this subject was much discussed by the learned seriesants engaged in it.

cussed by the learned serjeants engaged in it.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER MICHAEL-MAS TERM, 1825.

HUGHES v. BREEDS et al.

If a written paper contain a specification of goods, and the vendor by it agree "to finish the goods in a tradesman-like manner." This agreement does not require any stamp, as it is an agreement for the sale of goods, and not for the doing of work. And it need not be specially declared on.

Assumpsite for marble chimney-pieces sold and delivered, with the common money counts. Plea—General issue.

The question raised was, whether the following written agreement (which

was not declared on in any special count) required a stamp.

- "Marble chimney-pieces for the Castle Inn. 'I wo black marble in the large room, one statuary in the back room adjoining." (It specified several more chimney-pieces.)
- "Memorandum of an agreement between Breeds, Farncomb, & Co., and Thomas Hughes, Clerkenwell, London. The aforesaid T. Hughes doth agree to finish the aforesaid marble chimney-pieces in a tradesman-like manner, at prices before agreed to, by the 4th of June, 1818."

"This agreement agreed to on the 1st day of May, 1818.

"T. Hughes doth further agree to execute the above order by the time abovementioned. In default, T. Hughes to forfeit the price of the aforesaid chimney-pieces. A bill at three months for the amount. (Signed by the parties.")

Chitty, for the defendant Farncomb, objected, that this agreement required a stamp, because the goods were not in a state to be delivered when the agreement was entered into—something more was to be done—they were to be finished. And he cited Buxton v. Bedal, 3 Ea. 303.†

*Abbott, C. J. I think this is a contract relating to the sale of goods; and, therefore, within the exception of the stamp act: the defendants order the goods, and the plaintiff is to complete and send them. That is only

goods sold.

Campbell, on the same side. Perhaps your Lordship will save the point. This agreement was entered into before the goods were complete; and therefore is an agreement for work to be done, as well as for the sale of the goods when complete, and therefore ought to be stamped. The plaintiff first agrees to make what were blocks of marble into chimney-pieces; and then to sell them to the plaintiff: it cannot, therefore, be an agreement for the sale of goods, as they were not goods in a state to be sold at the time of entering into the contract.

ABBOTT, C. J. It by no means appears that the chimney-pieces did not exist at all, but rather the contrary, for it seems they only required to be finished. I am clearly of opinion, that this is a contract relating to the sale of goods, and therefore does not require any stamp. I think that the fact, that something remained to be done to the goods before the delivery makes no difference; indeed, I have no doubt on the point.

Verdict for the plaintiff.—Damages, 771. 16s.

^{&#}x27; In that case it was held, that a contract for the making of goods required a stamp. The words of the exemption in the stamp act, 55 Geo. 3, c. 184, are "memorandum, leter, or agreement made for or relating to the sale of any goods, wares, or merchandizes"

Gurney, and D. F. Jones, for the plaintiff. Campbell, and Chitty, for the defendant Farncomb. Hutchinson, for the defendant Breeds.

[Attornies—G. Selby, and Knowles, for the defendant Breeds, and Gregson & F., for the defendant Farncomb.]

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*DAFTER v. CRESWELL, Esq.

If one execute a ship's articles to serve on board as an able seaman, at certain wages, and when on beard act as a cuddy-servant; if there be no express agreement that he shall receive separate wages as a cuddy-servant, he can maintain no action against the captain for wages in that capacity. Whether he could, if there were an express agreement—Quere.

Assumpsit for work and labor as a servant.

It appeared on the part of the plaintiff, that he was employed as the cuddy-servant of the Astell East India ship, of which the defendant was the captain; and the plaintiff's former master, Captain Freeman, proved, that he had employed him, and found him a valuable cuddy-servant, and always gave him enough to make up his seaman's wages 351. a year. The cuddy-servant is the person who waits at dinner, &c., on the passengers on board East Indiamen.

Scarlett, for the defendant. I submit, that the plaintiff must be called, for he has executed the ship's articles as an able seaman, at 35s. a month wages; and, according to the authorities and the act of parliament, he can recover no more. In the case of White v. Wilson, 2 Bos. and Pul. 116, it was laid down, if a man agree by the articles to serve for certain wages, he cannot recover more. And by the stat. 2 Geo. 2, c. 36, the owners of ships are obliged to have articles signed containing the terms agreed on. And it has been held also in the Admiralty Courts, that no man can recover more than is specified in the ship's articles. Now the plaintiff had been paid the sum specified in the articles, and more.

The ship's articles, signed by the plaintiff, and dated *December* 2d, 1819, were put in. By those, it appeared that the plaintiff agreed to serve as an able seaman at the wages of 35s. a month; and the purser proved payments to him to more than that amount.

Gurney, for the plaintiff. We do not go for seaman's wages.

ABBOTT, C. J. I think you ought to be nonsuited. I am of opinion, that, in point of law, the ship's articles are conclusive. If you had proved a distinct contract for the *plaintiff to recover more, I would have allowed you to go on, but you only attempt to raise an implied assumpsit.

Gurney. I was going to contend, that the case was distinguishable from the authority cited: that was the case of a mate, whose services were of a kind to be within the articles, but the plaintiff's services, for which he now claims a compensation, were distinct from those of a seaman, namely, those of a cuddy-servant. The defendant does not take him, because he is a seaman, but goes and asks his character of a former master; and we have also proved that a cuddy-servant receives wages.

ABBOTT, C. J. The only evidence is, that Captain Freeman used to pay

his cuddy-servant.

Gurney. The plaintiff is proved to be an excellent servant.

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ABBOTT, C. J. I am very sorry to interrupt you, but I am decidedly of opinion, that if a man signs the ship's articles as a searcan, he can recover no more wages than are there agreed for, however he may be employed on board the ship; you have proved no express contract for him to be paid more; if you had, I would not have stopped the case; but as it is, I feel bound to nonsuit.

The plaintiff was then nonsuited, with liberty to move to enter a verdict for the plaintiff, if the Court above should think the action maintainable.

Gurney, and Chitty, for the plaintiff. Scarlett, and Cresswell, for the defendant.

[Attornies—W. Williams, and Ball & B.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J8.

In Banc.

Gurney now moved in pursuance of the leave given at the trial; but the Court concurred in the opinion given by the Lord Chief Justice at the trial, and refused the rule.

By the stat. 2 Geo. 2, c. 36, s. 2, it is enacted, "that if any seaman or mariner enter or ship himself on board any merchant ship or vessel on any intended voyage for parts beyond the seas, he and they so entering themselves as aforesaid shall, and they are hereby obliged to sign such agreement or contract (in writing) within three days after he or they shall have entered themselves on board any ship or vessel, in order to proceed on any voyage as aforesaid, which agreement or agreements, or contracts, after the signing thereof, shall be conclusive and binding to all parties, for and during the time or times so agreed or contracted for, to all intents and purposes, any custom or usage to the contrary in anywise notwithstanding."

in anywise notwithstanding."

The case of White v. Wilson, 2 Bos. & Pul. 116, was an action of assumpsut by the mate of a ship engaged in the slave trade, on a promise, that in consideration of his services, the defendant would, in addition to his wages, pay him the value of one negro slave. It was proved that mates of slave ships usually received the value of one or two slaves, if they did not misbehave, and that the defendant had agreed to allow the plaintiff the value of one slave. It was contended, that the act of parliament applied only to wages in the strict sense, and not to collateral perquisites, which might be agreed on. But the Court said, that it was impossible to consider this perquisite in any other light than as wages; and that, if it were otherwise, it would be the means of evading the statute.

STOCKDALE v. ONWHYN.

No action can be maintained for pirating a work which professes to be the amours of a courtezan, and it is no answer to the objection that the defendant is also a wrong doet in publishing them, and that he therefore ought not to set up their immorality. Seable, that a person being seen correcting the MS. is not sufficient evidence that the copyright of a work is his.

Case for pirating a work, published by the plaintiff, entitled, "Memoirs of Harriette Wilson." Plea—General issue.

† The statute 54 Geo. 3, c. 156, s. 4, recites that, by an act of the eighth year of Quees Anne, and the forty-first year of his late majesty's reign, "the author of any book of books, and the assignee or assigns of such author, respectively, should have the sole liberty of printing and reprinting such book or books for the term of fourteen years, is

To show the work to be the copyright of the plaintiff, a witness was called, who stated, that, before it was *printed, he saw the manuscript in the hands of the plaintiff, who was correcting it. But it also appeared from the cross-examination of the plaintiff's witnesses, that the work professed to be an account of the amours of Harriette Wilson, a courtezan; and that it contained the particulars of an intrigue between a person stated to be a Colonel, and a female called Julia; and also a conversation between Harriette *Wilson and a nobleman, who was named, who wished to procure her *166] as a mistress for his son.

ABBOTT C. J. How is the copyright shown to be in the plaintiff?

Brougham, for the plaintiff. We show the manuscript to be in his hands before it was published.

ABBOTT, C. J. Then the action cannot be maintained on another ground. This is a work that the law will not protect.

Brougham. In every case that has occurred, the objection to the morality

commence from the day of first publishing the same, and no longer; and it was provided, that after the expiration of the said term of fourteen years, the right of printing or disposing of copies should return to the authors thereof, if they were then living, for another term of fourteen years: And whereas it will afford further encouragement to literature, if the duration of such copyright were extended in manner hereinafter mentioned; Be it the auration of such copyright were extended in manner hereinatter mentioned; Be it further enacted, that, from and after the passing of this act, the author of any book or books composed and not printed and published, or which shall hereafter be composed, and be printed and published, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also, if the author shall be living at the end of that period for the residue of his natural life; and that if any boukseller or printer, or other person whatsoever, in any nart of the united kingdom of Great Relations printer, or other person whatsoever, in any part of the united kingdom of Great Britain and Ireland, in the Isles of Man, Jersey or Guerwsey, or in any other part of the British dominions, shall, from and after the passing of this act, within the terms and times granted and limited by this act as aforesaid, print, reprint, or import, or shall cause to be printed, reprinted or imported, any such book or books, without the consent of the author or authors, or other proprietor or proprietors of the copyright of and in such book and books, first had and obtained in writing; or, knowing the same to be so printed, reprinted or imported without such consent of such author or authors, or other proprietors, shall sell, publish or expose to sale, or cause to be sold, published or exposed to sale, or shall have in his or their possession for sale, any such book or books, without such consent first had and obtained as aforesaid, then such offender or offenders shall be liable to a special action on the case, at the suit of the author or authors, or other proprietor or proprietors of the copyright of such book or books so unlawfully printed, reprinted or imported, or published or exposed to sale, or being in the possession of such offender or offenders for sale as aforesaid, contrary to the true intent and meaning of this act: and every such author or authors, or other proprietor or proprietors, shall and may, by and in such special action upon the case, to be so brought against such offender or offenders, in any court of record in that part of the said United Kingdom, or of the British Dominions, in which the offence shall be committed, recover such damages as the jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit; in which action no wager of law, essoin, privilege or protection, nor more than one impariance, shall be allowed; and all and every such offender and offenders shall also forfeit such book or books, and all and every sheet being part of such book or books, and shall deliver the same to the author or authors, or other proprietor or proprictors of the copyright of such book or books, upon order of any court of record in which any action or suit in law or equity shall be commenced or prosecuted by such author or authors, or other proprietor or proprietors, to be made on motion or petition to the said court; and the said author or authors, or other proprietor or proprietors shall forthwith damask or make waste paper of the said book or books and sheet or sheets; and all and every such offender and offenders shall also forfeit the sum of threepence for every sheet thereof, either printed or printing, or published or exposed to sale, contrary to were sneet thereof, either printed or printing, or published or exposed to sale, contrary to the true intent and meaning of this set; the one moiety thereof to the king's most excellent majesty, his heirs and successors, and the other moiety thereof to any person or persons who shall sue for the same, in any such court of record, by action of debt, bill, plaint or information, in which no wager of law, easoin, privilege or protection, nor more than one imparlance shall be allowed: Provided always, that in Scotland such offender or "enders shall be liable to an action of damages in the court of session in Scotland, which hall and may be brought, and procedured in the same manner in which savides action shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there; and in any such action where damages shall be awarded, double costs of suit or expenses of process shall be allowed."

By s. 10. it is provided that all actions shall be commenced within twelve morths next after the offence committed.

of the work has been taken by innocent parties, and not by one defending he own wrong.

Scarlett, for the defendant. The question here is, whether the plaintiff can make out such a case as will entitle him to recover.

ABBOTT, C. J. Every one who comes to seek the protection of the law for his property, must show that property to be worthy of that protection; now this is professedly the history of a courtezan.

Brougham. There are many excellent works in which objectionable

passages might be found.

ABBOTT, C. J. The distinction between the works you allude to and the present is this: in those, although some passages might be found which are of an objectionable nature, yet the general tendency of those works is good Now, this work is professedly bad, and cannot be defended in any way. The plaintiff must be called.

Nonsuit.

*BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J& [*167

In Banc.

Brougham now moved for a rule nisi for a new trial. The doctrine, that there can be no property in a work like this, rests on a dictum of Lord Chief Justice Eyre, on the Midland Circuit.† And the Lord Chancellor *relied on that dictum in the case of Walcot v. Walker, 7 Ves. 1; but it is one thing to refuse an injunction, and another to hold that no action is maintainable. The most accurate account of that dictum will be found in the argu-

† The case before Lord Chief Justice Eyre, stated by Sir S. Remilly, 2 Mer. 437, was an action brought by Dr. Priestley against the hundred, "for damages for the injury sustained by him in consequence of the riotous proceedings of a mob at Birmingham; and, among other property alleged to have been destroyed, he claimed a compensation for the loss of certain unpublished MSS.. offering to produce booksellers as witnesses, to prove that they would have given considerable sums for them. On behalf of the hundred, it was alleged that the plaintiff was in the habit of publishing works injurious to the government of the state; but no evidence was produced to that effect; upon which Lord Chief Justice Eyre said, if any such evidence had been produced, he should have held, it was fit to be received as against the claim made by the plaintiff."

as against the claim made by the plaintiff."

In the case of Walzot v. Walker, 7 Ves. 1, the plaintiff prayed an injunction to prevent the defendant selling his works; as to one edition they submitted, but the Lord Chancellor (Eldon) said, "If the doctrine of Lord Chief Justice Eyre is right, and I think it is, that publications may be of such a nature that the author can maintain no action at law, it is not the business of this Court, even upon the submission in the answer, to decree either an injunction or an account of the profits of works of such a nature, that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property. It is no asswer, that the defendants are as criminal. It is the duty of the Court to know whether an action at law would lie; for if not, the Court ought not to give an account of the unhallowed profits of libellous publications."

In the case of Southey v. Sherwood. 2 Mer. 437, the Lord Chancellor said, "a distinction has been taken, to which a considerable weight of authority attaches, supported as it is by the opinion of Lord Chief Justice Eyre, who has expressly laid it down that a person cannot recover in damages for a work which is in its nature calculated to do injury to the public. On the same principle, the Court refused an injunction in the case of Walcot v. Walker, inasmuch as he could not have recovered damages in an action. After the fullest consideration, I remain of the same opinion as that which I entertained in deciding the case referred to."

With regard to the case of Bell v. Walker and Another. 1 Br. C. C. 451, it should be observed, that in the report nothing at all appears even tending to show that the Apology for the life of George Ann Bellamy, was a work of libellous or improper tendency; and the injunction was granted on the ex parte application of the plaintiff, only till answer and further order.

further order.

The cases of Forest v. Johns, 4 Esp. 97. and Hyme v. Dale, 2 Camp. 29 (a), only go to the points stated by Mr. Brougham in his argument.

ment of Sir S. Romilly, in the case of Southey v. Sherwood, 2 Merivale, 436, where it is stated, that Lord Chief Justice Eyre said, in an action by Dr. Priestley against the hundred, for damages done by a riotous mob, and for the loss of certain unpublished manuscripts; that if it had appeared that the manuscripts had been works injurious to the government, he should have held it fit matter to be received as evidence against the plaintiff's claim. In the case of Forest v. Johns, Esq., 4 Esp. 97, where the plaintiff had given a general order for "all the caricature prints that had ever been published," and obscene ones were sent, Mr. Justice Lawrence said, that he could not permit the plaintiff to recover for those; but no decision was come to in that case, as it was referred; and another question might have arisen there, namely, whether the print-seller was entitled, under a general order, to send prints of that description. Suppose a party to have stolen the book, could he say that he is not guilty of larceny, because the book was of an improper tendency?

LITTLEDALE, J. There is a difference between an infringement of copyright and a larceny: in the case of a larceny, the matter of which the book is com-

posed is stolen,—the paper, &c.

*Brougham. But the doctrine ought to be pushed one step further, if it is applied at all; and a Court should hold that even the paper was not protected, if converted to such a use. The argument used is, that, giving such works no protection, tends to suppress them. Now this is not so; for the dissemination of such works is much assisted, all the world being enabled to publish them; and if the principle be admitted, it not only applies where the whole is objectionable, but also where any part of it is bad. Thus the maxim of ubi plura nitent must be regarded as critical only, and not applicable in a legal point of view.

BAYLEY, J. You must take out the maculæ. HOLROYD, J. Is it not the injury done to the publication that you complain

of! and how can injury be done where there is no right to publish?

Brougham. In the case of Hyme v. Dale, 2 Camp. 29 (n), it was objected, that a stanza of a song was a libel on the administration of justice; and Mr. Justice Lawrence said, that that argument equally applied to the Beggar's Opera, where the language and allusions were sufficiently derogatory to the administration of public justice; but the action was maintained. In the case of Bell v. Walker, 1 Br. C. C. 451, Lord Kenyon granted an injunction to restrain the defendant from pirating a work called "An Apology for the Life of George Ann Bellamy," which was a history of her amours: and it should be observed that, in the case of Hyme v. Dale, Lord Ellenborough did not say he would nonsuit, even in the case of a libel so gross as to affect the public morals, but only that he would advise the jury to give no damages; by which his Lordship, no doubt, meant nominal damages. And the statutes were intended not only to protect the property of works, but to prevent piracy; and they did not give an action for an infringement of copyright, but rendered piracy punishable, imposed. *by enacting, that the sheets should be given up, and certain penalties

This was an action brought for an injury done by the pub-Аввотт, С. J. lication of a work first published by the plaintiff. From the evidence at the trial, it was perfectly clear that the work was, and indeed professed to be, a history of the amours of a courtezan. It contained not only much indecency, but much slanderous matter, with the names of the persons so slandered. The question therefore is, whether the plaintiff can claim damages for a supposed loss sustained by him in consequence of the invasion of his sale. If the plaintiff had no right to sell, how can he maintain an action? Every party concerned in ushering such a book into the world, has committed an offence against decency. Common sense, common law, and common justice, equally point out what should be the decision of the Court. I want no authority to warrant me in this judgment. I will however make one or two remarks on the

Rule refused.

decisions in Equity. One learned and eminent person, presiding in a Court of Equity, might think, that the best mode of putting down such works was an injunction to restrain their publication; another might think that that object would be best accomplished by not granting an injunction to protect them, as persons would then have less inducement to publish them in the first instance; the inducement to such publications being the desire of gain. On the comparative advantages of these two courses, I have not to decide: but as to the question immediately before this Court, it would be a disgrace to the common law if a judge could for a moment entertain a doubt about it.

BAVLEY, J. I concur entirely in what has been so forcibly stated by my Lord Chief Justice. In the case of Southey v. Sherwood, the principle that no person could have any right of property in any such work, was fully recog-

nized,

*Holroyd, J. I am of the same opinion.

LITTLEDALE, J. The statutes on this subject are intituled "Acts for the encouragement of learning."

Brougham, and Richards, for the plaintiff. Scarlett, and Chitty, for the defendant.

[Attornies-Noele, and Johnson.]

WATSON v. WACE et al.

If a person against whom a commission of bankrupt is sued out, apply to a judge at chambers, and obtain his discharge from custody, on the ground that his detaining creditors have proved under the commission, such person is by so doing precluded from disputing the validity of the commission, in a court of law, but may apply to the Great Seal.

TRESPASS for taking the plaintiff's goods. Pleas—1st. General issue. 2d. A justification under a commission of bankrupt sued out against the plaintiff.

The taking of the goods was admitted.

F. Pollock, for the defendants. The defence in this case is, that after the commission of bankrupt issued against the plaintiff, he being still in custody at the suit of three several creditors who had proved under the commission, he applied to a judge at chambers to be discharged out of custody on that ground, and obtained an order for his discharge. Now, if he availed himself of the advantages of this commission, and set it up for the purpose of getting himself discharged from custody, he cannot be allowed to contest its validity. The case of Goldie v. Gunston, 4 Camp. 381, was an action of trover by a bankrupt, to try the validity of the commission against him. In that case, orders for the discharge of the bankrupt out of custody, on the ground of his bankruptcy, were put in. It was contended, that the bankrupt might have applied for his discharge through ignorance. But Lord Ellenborough held, that if a man took advantage of a commission against him, he was precluded from afterwards contesting its *validity at law, though he might still apply to the Great Seal to supersede it; but his Lordship considered, that the mere fact of surrendering to a commission, would not be sufficient, as that was compulsory. And in the present case, the bankrupt having applied for his discharge under the commission, was estopped from disputing it.

Three Judges' summonses were put in, calling upon the plaintiffs in three sotions against the bankrupt, to show cause why he should not be discharged

out of custody, the detaining creditors having proved their debts under a commission of bankrupt issued out against him.

The Judges' orders were also put in, and the affidavits on which they were grounded; the latter stated, that the commission had issued, on which the

plaintiff was duly declared a bankrupt.

Scarlett, contra. My Lord Ellenborough held very strictly the acts of persons who took advantage of a bankruptcy; for his Lordship used to hold, that the bankrupt's treating with the assignees, was acknowledging the goodness of the commission; but that has not been the case since. And the statute 48 Geo. 3, c. 121, s. 14, enacts, that the proving a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved. Now, the proving heing the act of the creditor, the bankrupt ought not to be prejudiced by taking all the advantages which may result from it.

Campbell, on the same side. This act of admission by the bankrupt, like every other admission, is only prima facie evidence, and not conclusive. It is no more than his saying, "I was duly declared a bankrupt:" and the hardship of the case is, that if the commission against him be not good, he cannot have

a valid certificate founded on it.

*ABBOTT, C. J. I am clearly of opinion, that the decision of my Lord Ellenborough was right, and that I ought to act upon it. The bankrupt, by his acts, admits the validity of the commission; and asks, and obtains the benefit of it. Now, after that, he cannot turn round and say that the commission is not good. And nothing that I say, will prevent the plaintiff from making an application to the Great Seal if he shall be so advised.

Nonsuit.

Gurney, amicus curiæ, stated, that he had known that decision of Lord. Ellenborough acted on in more than one instance.

Scarlett, and Campbell, for the plaintiff.

F. Pollock, for the defendants.

[Attornies—J. M. Taylor, and Reeves.]

DENN, on the demise of BULKELEY, v. WILFORD.

A fine being levied of "12 messuages, &c., and 20 acres of land." If it appear that there are 19 houses on the conusor's land in the place—This is such an ambiguity in the fine as to let in psrol evidence, to show what part of the property was meant to be included in the fine, although the whole of the land the conusor had was under 20 acres.

Efectment to recover a mansion and other houses and lands at Chelsea. The lessor of the plaintiff was the heir at law of the late General Wilford, and had, by a former ejectment, (see ante, vol. 1, p. 284,) recovered certain property there, called the Ranelagh property. The late General's estate at Chelsea consisted of not quite twenty acres, of which the Ranelagh property was eighteen and a half. On the whole estate there were nineteen houses, including the mansion; on the Ranelagh property, twelve. The mansion house was not on the Ranelagh property. The General having, in the year 1822, contracted to sell about seven acres of the Ranelagh property to the governors of Chelsea Hospital, levied a fine of "twelve messuages, twelve

gardens, twenty acres of *meadow, with the appurtenances, &c., in the [*174

parish of Chelsea."

The question therefore was, as the levying of this fine revoked a will made in favor of the defendant, who was the General's widow, whether the fine must be construed to extend to the whole of the General's estate, or whether parol evidence was admissible to show that it related to the *Ranelagh* property only: and his Lordship admitted it. Parol evidence was given to show that the fine related to the latter.

The Attorney General contended, that, as the terms of the fine were large enough to cover all the property, the parol evidence could not do away with its effect: the fine was of twenty acres of land; as there were not more than twenty acres, all was included; for by levying a fine of land, the houses and every thing upon it passed; and if the General's title had been attacked as to any part, he would have set up the fine in his own favor; and if the fine would

protect the whole estate, it applied equally for all other purposes.

ABBOTT, C. J. I am of opinion, that the question, what is included in a fine, is a question of law and fact: because this fine is levied of twelve houses, and as soon as it is shown that there are more than twelve, it is competent to the parties to show which twelve were meant; and I shall direct the jury, that it is competent to them to consider what twelve houses were intended, and whether the mansion was one, although there may not be twenty acres of land without the ground on which that stands. I do not mean to say that it is necessary to mention messuages in a fine, or that the term "land" will not carry them; however, I don't say that it will; but in this case the parties did not trust to the word land, but have put in the word messuages; and I think the jury must say, on the evidence, "which twelve of the messuages [*175] were meant. If, however, the Court above should think that in this case parol evidence was not admissible, a verdict may then be entered for the lessor of the plaintiff. His Lordship then recapitulated the circumstances of the case.

The jury were of opinion, that the fine was meant to operate on the Rawleslagh property only, and found a verdict for the defendant.

The Attorney General, Scarlett, and Curwood, for the lessor of the plaintiff. Brougham, and Tindal, for the defendant.

[Attornies-Veal, and Ashmore & C.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

THE Attorney General now moved for a rule to show cause why the ver dict should not be entered for the lessor of the plaintiff. He argued that the parol evidence ought not to have been admitted. The fine being of twenty acres, there was no ambiguity. The land being all included, the houses would pass, whether mentioned or not; and, therefore, the mentioning of them will not make such an ambiguity as to let in parol evidence.

BAYLEY, J. Is not the sum paid to the king on the levying of a fine, regu

lated by the number of houses?

The Attorney General. Yes, my Lord; but in Com. Dig. tit. Grant, (E. 3.) it is laid down, that a grant of land includes castles, houses, and other buildings erected on the land. I do not mean to say, that it is not usual to mention

messuages in fines, but it is not necessary; and if the term land passes every thing, there is no ambiguity, and the fine must speak for itself.

*LITTLEDALE, J. How was the precipe of the fine? By a grant of land, the houses on it pass; but under a precipe for twenty acres of land, have you any authority to show that a house would be included?

ABBOTT, C. J. The different species of property included in a fine, are always mentioned in a prescribed order, which would hardly be required, if it was not necessary to mention any thing but the term land.

BAYLEY, J. I think the omission of houses, would be a fraud on the Crown.

Rule nisi.

In Co. Litt. 4, a, it is laid down, that the term land "legally include the also all castles, houses and other buildings, so as passing the land or ground, the structure or building thereupon passeth therewith." And in Com. Dig. tit. Fine, (E. 3,) it is said, that all things of which a fine is levied, ought to be mentioned in proper order, as an honor before a castle, a castle before a manor, and a manor before a messuage, and things general before things special; as land, the genus, before meadow, pasture, wood, &c., the species. (E. 4,) In a fine by the name of a messuage, a curtilage, garden, &c., pass, or they may pass by their respective names.

HOLIDAY v. SIGIL.

In actions for money had and received, brought by the owners of lost bank notes, against those who may have got them into their hands without giving value; it is not absolutely necessary for the plaintiff to give direct evidence of the loss. It is sufficient if such circumstances are shown as satisfy the jury of the fact of the loss.

Money had and received. Plea-General issue.

This action was brought to recover the amount of a Bank of England note for 500l., dated May 10th, 1823, No. 6869, which was alleged to have been accidentally lost by the plaintiff at Tattersall's, near Pinlico, and found by the defendant. A clerk of Marsh & Co. proved, that the plaintiff had received the note in question from their house; and it was further proved, that on the 2d of June, 1823, the plaintiff and defendant were both at Tattersall's, that being a *177] great settling day, and much money passing. The *plaintiff, while at Tattersall's, complained to Sayer, a police officer, that he had lost a 500l. note; and also employed Mr. Lee, his attorney, to take steps for the tracing of the note. A clerk of Messrs. Ransom & Co. proved, that they received it from the defendant on the 16th June, 1823; and a witness named Chiffney, who stated that he was a trainer, proved, that he was at Tattersall's on the 2d of June, and saw the plaintiff pass by him, and as he passed, he put his hand to his breeches' pocket; and soon after, the defendant stooped and picked up something. The witness stated, that he asked him whether he had picked up any notes, and that he said, "a small note I dropped."

The defendant, when spoken to on the subject, after it was found that he had paid it in at Ransom's banking house, said, that he had received it from a Ms.

Wilkins, who owed him 55!.

No witnesses were called for the defence.

ABBOTT, C. J. (to the jury.) The question to be considered is, whether you are satisfied that the plaintiff lost this note, and that the defendant found it; for if you are, the plaintiff is entitled to your verdict. I should observe, that it is scarcely possible for a plaintiff, when his property is stolen, or accidentally lost, to prove the loss by direct evidence; and, therefore, that must in almost all Vol. XII.—65

cases be made out by circumstances. His Lordship recapitulated the circumstances of the case.

Verdict for the plaintiff.—Damages, 500/.

Scarlett, and Manning, for the plaintiff. Brougham, and Tindal, for the defendant.

[Attornies-Windus, and Sigil.]

See Gill v. Cubitts, Ante, Vol. 1, p. 163, and 487. Downs v. Halling and Other, Ante, p. 11.

*BAXTER, et al., v. The EARL OF PORTSMOUTH. [*178

A person who is, in the year 1823, found by an inquisition to be a lunatic from the year 1809, is liable for necessaries suitable to his degree furnished to him in the year 1819, he at that time acting in all the ordinary affairs of life.

If it appeared that he had been imposed upon, it might be otherwise.

Whether a person can set up his own lunacy—Quere.

Assument for the hire of carriages and harness.

Scarlett, for the plaintiffs, opened, that the plaintiffs were coachmakers, and that the action was brought for the hire of a landau and a phaeton from the year 1819, to the year 1823. The carriages had been both continually used by Lord Portsmouth. The intended defence was, that the Noble Lord was a lunatic; but, at the time of the hiring of these carriages, and for some time after, he was not the subject of a commission of lunacy, but, on the contrary, voted as a peer on various public occasions, sometimes in person and sometimes by proxy, and also went about and acted as an ordinary person. He argued that a lunatic was not protected from contracts for necessaries, and his case was like that of an infant. If unfair advantage had been taken of the Noble Lord's state of mind, that would go to cut down the bill. In the case of Neill v. Morley, 9 Ves. 478, Sir William Grant would not set aside the contract of a lunatic merely because it was over-reached by the inquisition of the jury on a commission of lunacy, as it did not appear to be an unfair transaction. If the carriages were necessary and proper, the Noble Lord ought to be bound; but if they were improper, (like the case of an infant,) the party ought not to recover. The defendant was a peer, and it would be for the jury to say, whether the carriages were not suitable to his rank.

Evidence was given of the hiring of the carriages and harness, and of the terms.

Brougham, for the defendant. I submit, my Lord, that the plaintiffs must be nonsuited; and my objection is this; That Lord Portsmouth had no capacity to contract; for it is admitted in this case, that, by an inquisition, dated February 28, 1823, and taken under a commission of *lunacy, the Noble [8179] Lord was found a lunatic, "so that he is not sufficient for the government of himself, or his manors, messuages, lands, tenements, goods and chattels; and that he has been in the same state of lunacy from the 1st day of January, 1809." Now, I submit, that a lunatic cannot contract; and the distinction relative to the contracts of an infant does not apply, because an infant can make a contract, though he may avoid it or not, as he may find it convenient; but, in the case of a lunatic, the power of contracting is wholly wanting; and it should be observed, that the case in 9 Ves. did not at all go on the ground of the things contracted for being necessaries or not.

Scarlett, contra. In an Anon. case, 13 Ves. 590, Lord Eldon says, that a commission of lunacy will not protect the lunatic against an action; and that a commission of bankruptcy being a species of action, lunacy is therefore not a defence to it.

ABBOTT, C. J. I am of opinion that, on this evidence, the plaintiffs are entitled to recover a reasonable sum for the hire of their carriages, not on the ground of a contract, but for the actual use of the carriages; for that is very different from being bound by contracts in the ordinary meaning of the term.

Brougham. With great submission, my Lord, the user is only adduced as

evidence of an implied contract, which implied contract is sued on.

ABBOTT, C. J. It has been doubted, whether it is competent to a person to set up his own incompetency to contract: but, going upon an executed contract is very different from attempting to bind a lunatic on a mere contract, on which nothing has been done. If a person is at large in the world, and only has what is necessary, I am clearly of opinion that it must be paid for; but if "you show a party to be a lunatic, and that he had something decidedly improper, I do not say that a Court and jury ought not to say that unfair advantage was taken of his state; but here, the defendant had nothing but what the most sane man of his rank ought to have. These plaintiffs are entitled to a verdict.

Verdict for the plaintiffs.—Damages, 543l.

Scarlett, and Jardine, for the plaintiffs. Brougham, for the defendant.

[Attornies—Martineau & M., and Plumptree.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Brougham now moved for a rule nisi for a new trial, on the ground that the inquisition unrebutted was sufficient proof of the lunacy of the defendant. A lunatic has no more contracting mind than if he were dead. It has been said, that a man shall not stultify himself; but that still it was open to the jury to say, whether they thought him sane or not. And he cited F. N. B. 466; Stroud v. Marshall, Cro. Eliz. 398; Beverley's case, 4 Rep. 126 a, and 127 a; Co. Litt. 247 a, and 1 Cha. Ca. 113.

BAYLEY, J. Has lunacy ever been a defence to an action for necessaries,

as meat from a butcher, or clothes from a tailor.

Brougham. I believe not, my Lord; but I contend that he could not contract, because he had no mind. Some of the older authorities go to show, that the party cannot himself set up this defence; but in the case of Yates v. Boen, 2 Str. 1104, the defence of lunacy succeeded in an action of debt; and in the cases of Sergeson v. Sealy, 2 Atk. 412, and Faulden v. Silk, 3 Camp. 181] 126, these inquisitions were held to be evidence against strangers, Lord Hardwicke saying, that inquisitions of lunacy, and likewise other inquisitions, as post mortem, &c., were always admitted to be read, but not conclusive, as you may traverse them, if you please.

ABBOTT, C. J. Show that he was imposed upon, and that will make a

great difference.

Brougham. The authorities go to show, that the office has the effect of

making void all contracts.

Scarlett. Although the inquisition may be evidence, yet in this case Lord Portsmouth went about and acted as an ordinary person.

ABBOTT, C. J. I thought that the evidence was not sufficient to defeat the action, as the goods were suitable to the degree of the defendant, and actually used and enjoyed by him. You can distinguish this case from those of contracts not executed, or which show imposition and advantage taken of the want of understanding of the party. I desire to be understood, that my opinion does not extend to those cases.

BAYLEY, J. Where there is no imposition, and the goods furnished were suitable to the degree of the party, I think that his being found by the inquisition to be not sufficient to govern his affairs, is not enough to put an end to the action. Many men are perfectly sound in mind on every point but one; and if persons sell them goods, about which there is nothing which affects the point on which they are of unsound mind, are those persons to lose their money when they could not be aware of any insanity? I think not. And if a person is in such a state of mind as not to be fit to act in matters of ordinary life, he should *be placed by his friends under such a restraint, as to prevent his making such contracts as these.

Holroyd and Littledale, Js., concurred.

Rule refused.

In F. N. B. 466, it is said, that "the writ of dum fuit non compos mentis, lieth where a man alieneth in fee, &c., if he be afterwards deforced by his alience or lessee, notwithstanding his own alienation or lesse: and the same appeareth by writa in the Register; and some have said, that this writ lieth not by him who alieneth the land, because he shall not disable himself, nor contradict his own deed, but that seemeth to be little reston, for this is an infirmity which cometh by the act of God; and it standeth with reason, that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time. And it appeareth in Britton, (tit. Dette, fo. 66,) that in debt upon a bond, the defendant said, he was not sane memorie at the time of making the bond, and that was held a good plea. And in the Year Book, 9 Hen. 6, 6, it is laid down, 'Si on de non saine memorie face un feofement ce est voide.'"

Lord Chief Justice Brooke, in his Abridgment, tit. Dum fuit, pl. 3, says, that "if one of non sane memory make a feofiment, he cannot have action or entry, for he cannot disable himself—and per Prisot, he cannot know in his good memory what he did while non compos mentis." But his Lordship refers to F. N. B. and Britton, as before cited; and at pl. 7, takes this distinction: "If a judge or justice be of non sane memory, yet the fines, judgments, and other records that are before him, shall be good; but otherwise, of the gift of an office by him, or of this kind; for that is a matter in fait, and the otherwise of the gift of an office by him, or of this kind; for that is a matter in fait, and the otherwise of record."

In Litt. s. 405 and 406, it is laid down, that "if one has nothing to say, but that he was

In Litt. s. 405 and 406, it is laid down, that "if one has nothing to say, but that he was not of same memory at the time of a discent, &c., he shall not be received to say this; for no man of full age shall be received in any plea by the law to disable his own person, but the heir may well disable the person of his ancestor for his own advantage in such case." And Lord Coke, 1 Inst. 247 a, says, if an idiot make a feofiment in fee, he shall in pleading never avoid it by saying, that he was an idiot at the time of his feofiment, and so had been from his nativity. But upon an office found for the king, the king shall avoid the feofiment for the benefit of the idiot, whose custody the law giveth to the king. So it is of a non compos mentis by accident, if an estate be made during his lunacy; for albeit the parties themselves *cannot be received to disable themselves, yet twelve men parties themselves, yet twelve men parties upon their oaths may find the truth of the matter. Lord Coke then says, that there is a difference of opinion, as to the effect of the acts of lunatics; and adds, that Littletes is of opinion, that neither by writ, ples, nor otherwise, can the lunatic himself avoid them:

"and herewith the greatest authorities of our books agree, and so it was resolved in Beverley's case, 4 Rep. 126."

In the case of Strond v. Marshall, Cro. Eliz. 398, there was a plea of lunacy to debt upon bond; the plea was held bad on demurrer, and the doctrine in F. N. B. expressly overruled—however, in the case of Leach v. Thompson. Ca. Parl. 150, the doctrine of F.

N. B. was supported.

In the case of Yates v. Boen, 2 Str. 1104, the defendant wished to set up lunary as a defence in an action of debt. The Lord Chief Justice at first thought, on the rule in Beverley's case, that no one could stultify himself; but, on the authority of Leach v. Thespren, and a case before L. C. B. Pengelly, he suffered it to be given in evidence; and the plaintiff most the suite of the suit tiff upon the evidence became nonsuit.

The case of the Attorney General v. Parkhurst, Ca. Cha. 112, was a bill by the Attorney General v. Parkhurst, Ca. Cha. 112, was a bill by the Attorney General for the repayment of the price paid by a lunatic for an estate. It appeared, that, at the time of the purchase, the lunatic did usually barter; but was, eight years after found a lunatic, with a retrospect of seventeen years. The prayer of the bill was granted by Justice Tyrrel; but the Lord Keeper stayed the passing of the decree, and gave liberty to the defendant to traverse the inquisition.

In the case of Niell v. Morley, 9 Ves. 478, the lunatic, being a plumber, attended a sale of building materials, and bought several lots; this occurred in the month of May, 1800 in the month of Magust following, an inquisition was taken, finding him lunatic from the 1st of May, 1797; a bill was filed by his committee to recover back the purchase money, but there appearing nething unfair in the sale, Sig W. Grant refused to interpose, and said, "assuming it to be the legal consequence, that every act of the lunatic, subsequent to the time, (found by the jury.) is absolutely void; nothing can be more inconvenient, than for this Court to give effect to that legal consequence; setting aside every dealing in the course of his trade, giving an account of all he has lost, &c. If the plaintiff is right in saying all this is void at law, let him resort to law, and recover if he can."

In the case of Manby v. Scott, 2 Sid. 112, it is said, that "an infant will be bound by his contract, in a case where he is a housekeeper and bought necessaries for his household: "

•1847

*BEFORE MR. JUSTICE BAYLEY,

(Who sat for the Lord Chief Justice.)

REX v. HADDEN.

On scire facias to repeal a patent for a machine, on the ground that it is not new, you may, to prove that, put into the hand of a witness, who had constructed a machine for the same purposes, a drawing not made by himself, and ask him whether he has such a recollection of the machine he made, as to be able to say, that that is a correct drawing

Screw facias to repeal a patent granted to the defendant for an improved machine, for the roving, preparing, and spinning of wool; on the ground that the machine was not new.

To prove the machine not new, a witness was called, who proved, that he had, long before the patent, constructed a machine for those purposes; and to show that it was similar to the defendant's machine, the counsel for the proseeution put into his hand a drawing of the machine the witness had constructed. The drawing, however, was not made by the witness.

The Attorney General, for the defendant, objected, that, as the drawing was not made by the witness, he ought not to look at it, but should describe the machine he had constructed; for that this was a lumping way of leading the

witness.

Gurney, contra. Plans are always put into the hands of witnesses who did not draw them.

A plan of a place is certain; but this is exactly the same as if the counsel described a machine, and then said to the witness, was that what you made?

BAYLEY, J. I think the witness may look at the drawing, and you may ask him, whether he has such a recollection of the machine he made, as to be able to say, that that is a correct drawing of it.

Verdict for the Crown.

*Gurney, Alderson, and Rotch, for the prosecution. *185] The Attorney General, Scarlett, Bolland, and Brougham, for the desendant.

[Attornies—Evans & T., and Lowden & Co.]

COURT OF COMMON PLEAS.

SITTINGS IN LONDON, IN MICHAELMAS TERM, 1825.

BEFORE LORD CHIEF JUSTICE BEST.

CURTIS v. BARKER.

A judge at Nisi Prims will put off a trial on application by a plaintiff till the next sitting, if it be in term, or for a few days, if it be after the term; but if longer delay be required, the plaintiff can only obtain it by withdrawing the record; but this application is never granted without very special circumstances, or the consent of the other party.

In this case, Hutchinson, for the plaintiff, applied on affidavit to put off the trial till the next Sitting in Term.

Vaughan, Serjt., for the defendant, objected, on the ground that a plaintiff

may withdraw the record.

BEST, C. J. It is usual to put off a trial on the application of a plaintiff, showing special circumstances, till the next Sitting, if it be in Term, or for a few days, if it be after the Term; but not beyond that. I am informed, that my Lord Chief Justice Abbott has taken this distinction in the Court of King's Bench; and I think it a very sensible and proper one.

Application granted.

Hutchinson, for the plaintiff.
Vaughan, Serjt., for the defendant.

[Attornies-Cooke & W., and Cunningham.]

In general, the Court will not put off the trial on the application of the plaintiff, but put him to withdraw the record. This practice is, however, sometimes inconvenient, as, by withdrawing the record, and re-entering it, the cause is often put off for a much longer time than the parties wish. But the Court will very seldom grant this application without the consent of both parties.

*BROOKES v. DAVIES.

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A paper in the form of a receipt, if it is not given in evidence as a receipt, does not require a stamp.

Assumptor on a bill of exchange against the acceptor. After the formal proof on the part of the plaintiff, a witness was called for the defendant, who sated, that after the bill was due, he took twenty yards of cloth to the plaintiff's house, together with a paper in this form:—

" Mr. Brookes

"Twenty yards of cloth "Overdue bill			To J. Davies.				
	•	• .	•	٠.	• .		14 <i>l</i> . 13 <i>l</i> .
" Balance due .	•	•	•	•	•	•	1/.
	"Dessional I Dession !!						

"Received, J. Davies."

The cloth and the paper were delivered to a lady, who took them both up stairs; and, when she came down, said, that Mr. Brookes would see Mr. Davies.

Vaughan, Serjt., objected to hearing what the lady said. They should call her as a witness.

Wilde, Serjt. She is the plaintiff's wife. Vaughan, Serjt. That is not proved.

Wilde, Serjt. We may prove what was said at the time.

BEST, C. J., thought it might be proved as a fact.

The witness told the lady, that, as the bill was receipted, he must take it back. Upon which she fetched it for him, but retained the cloth. It was then proposed to read the paper.

Vaughan, Serjt., objected, that it did not appear that it had ever come to the

hands of the plaintiff.

BEST, C. J., was of opinion, that, under all the circumstances, it ought to be received.

*Vaughan, Serjt., then objected, that it had no stamp. Wilde, Serjt. I do not offer it as a receipt.

BEST, C. J. I determined once upon the Oxford Circuit, and I believe my decision was never questioned, that a paper not put in as a receipt, does not require a stamp.

Verdict for the plaintiff.

Vaughan, Serjt., and Richards, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies-Henson, and Abrams.]

BEFORE BEST, C. J., AND BURROUGH, PARK, AND GASELEE, JS.

At Bar.

TOOTH, Demandant, v. BAGWELL, Tenant.

On the trial of a writ of right, the four knights who return the grand assize, must themselves attend and sit with twelve of the jurors whom they return; a jury of sixteen, so constituted, being by law required for the trial, and any sixteen of the assize are not sufficient.

On an affidavit of particular circumstances, such as the great age and expected death of witnesses, the Court will depart from their general rule, not to try a writ of right in an issuable term.

If it appear, on the day appointed for the trial, that one of the four knights is so ill that

he not only cannot then attend, but is not likely to be able to attend on a future day, the Court will order the sheriff to summon another knight to act in his stead; and it will not be necessary that any fresh selection of a grand assize should be made by the knights, in consequence of the alteration which takes place in their body.

WRIT of right. On the jurors in this case being called, it appeared that two of the knights who had chosen the grand assize were absent; one in the country, and the other from indisposition.

The Court intimated an opinion, that the cause could not proceed without

them.

Bosanquet, and Taddy, Serjts., for the demandant, contended, that it was sufficient if any sixteen of the jurors attended, and that it was not necessary for all the knights to form a part of the jury. The authorities referred to in the course of the argument, were Booth on Real Actions; Moore, 67; 2 Rolle's Abridgment, 674; Year Book, 22 Edw. 3, 18; Cro. Car. 511; 3 Wilson, 541.

The Court thought, that all the four knights ought to form a part of the jury for the trial of the case, and were about to direct an adjournment for default of jurors, till a day in *Hilary* Term, when it was suggested that it must then be again adjourned on account of the practice of the Court never to try a writ of right in an issuable Term.

Bosunquet, Serjt., submitted, that the rule was not positive.

BEST, C. J. I have consulted the officers of the Court, and find that it is a general rule. A case has been mentioned to me of the King v. Watson, for high treason, which was a trial at bar in an issuable term; but that was done at the application of the Attorney General, who had a right to require it.

Bosanquet, Serjt., then mentioned, that one of their witnesses, a very old person, had died during the progress of the cause; and that others of them were

so aged and infirm, as not to be likely to survive much longer.

BEST, C. J. Let an affidavit be made of those facts, and we will relax from

our general rule.

The case was then adjourned to the quarto die post in the following Hillery Term.

On this day the case was again called on, and it appeared, both from the return of the sheriff, and the evidence of a medical gentleman, that Sir George Alderson, one of the four knights, was so indisposed, that he was not only *unable to attend then, but was not likely, from the state of his disor[*189] der, to be able to attend on any future day.

Upon this, the counsel for the demandant applied to the Court either to strike out all that had been done, and direct a commencement de novo, or to order process to issue for the selection of a new knight to fill the place of the

one whose attendance could not be obtained.

The counsel for the tenant objected to both courses, and contended that the case must be adjourned till the knight should be able to attend. A writ of right is a vexatious proceeding, and is not entitled to any favor from the Court. In Adams v. Radioay, 1 Marsh. 602, L. C. J. Gibbs observes, "the rule which has been adopted, on consideration, is, that as a writ of right generally seeks to disturb a possession which has continued for a considerable length of time, the Court will not assist the demandant in getting over any difficulties that may occur to him." And in the same case Mr. Justice Heath says, "that a writ of right is in general a very vexatious proceeding." The four knights must choose twelve or more, and there can be no other mode of trial except by the four knights themselves, and twelve of those whom they summon; at least, while the four knights are living. As to the case in Coke's Entries, it is very

different from this; for there, the knights had not made their election. Before the statute, in the case of a special jury, a cause must have gone off on account of illness, pro defectu juratorum.

BEST, C. J. Suppose, before the statute, eleven of the jurors had died.

The tenant's Counsel. There is a distinction between a case of death and one of temporary incapacity merely. The party in this case has no right to favor, and ought not to have more ex debito justitise than the precedents "will clearly warrant. The passage in the Year Book, 22 Edward 3, 18,† does not amount even to an obiter dictum, but is only an idle discussion upon a collateral point. It may be very probable that Sir George Alderson may not be able to attend at a future day; but, notwithstanding, the Court should wait and see.

Gaselee, J. And how many of the other fifteen might die in the mean time? The tenant's Counsel. The law never receives or acknowledges the excuse of temporary incapacity. That a party is too ill to be likely to be able to attend is too uncertain: it may be a ground of entering a continuance, but nothing more. In the absence of precedents, and considering the vexatious nature of the proceeding itself, it is to be hoped that the Court will not think it right to interfere.

BEST, C. J. It is said, that a writ of right is a vexatious proceeding; perhaps that is rather too strong an observation. Undoubtedly, the Court will give no assistance; but many cases may occur in which it would be against all justice to prevent a party from recovering after twenty years. I hope that it will not be long before the attention of Parliament is called to the subject, and that less than sixty years will be fixed; and that suitors will not be obliged to have recourse to a proceeding so seldom occurring, and consequently so little understood. It has been said, that, in a writ of right, a party ought not to receive indulgence; but that has been in those cases where the party's own laches has made his application necessary. "Actus Dei nemini facit injuriam," is one of the maxims of the law; and the principle of not *granting indulgence ought not to be applied to cases of difficulty occurring by the act of God. We are asked to adopt one of two courses. 1st. We are asked to expunge all that has taken place, and let the parties begin again. To this we object, because a writ of error could not be brought, as the proceeding would not appear on the record. 2dly. We are called upon to direct the sheriff to summon another knight to fill up the vacancy occasioned by the inability of Sir G. Alderson to This plan I will allow to be adopted, and will trust that all courts will consider that that which is good sense is also good law. We have only to cure a defect; and, on the principles of common sense, the best way in which we can do that is by directing the sheriff to summon another knight. A venire must issue, and a distringus is to be added. When the knight comes, there will be no occasion to choose another grand assize. It is said, that the opinion of the judges in the case in 22d Edward 3d, is a mere obiter dictum. It is true, that it is so, and if we had the benefit of decided cases and personal experience, as we have upon subjects which are often before us, we should pay perhaps but little attention to such an opinion. But we ought to consider that it is an obiter dictum, delivered when the subject was of more frequent occurrence, and not met by any counter authority. Unless we are to say that, although the legislature has left the writ of right standing, we are not to facilitate its execution, we must grant the application in the second alternative. My brother Wilde has said, that the evidence of illness in this case is too uncertain; but medical evidence is every day acted upon in discharging jurors, and putting off trials. It is true, that the case in Edward 3d, is a case of death,

[†] The passage alladed to is the following: "Mais autres diss. q. si al. Venire fac. retorne soit qu'un est mort Habess corpors issera, &c. et aus Venire, &c. de faire venis un autre chevalier. Quære proces; et a'il vient et soit challenge il sera trie in court," Vol. XII.—66 2 T 2

and therefore is a little different from this; but the law would ill deserve the name of a science, if we were bound to find a precedent for every case that occurs. That which is done in a case of death, ought to be done under circumstances which are equivalent to edeath, as far as the progress of the cause is concerned, viz. present and most probably permanent incapacity.

PARK, J. The first proposition would be an inconvenient one. Though this case in specie is not found in the books, yet the principles upon which it is to be decided are there clearly laid down. Adams v. Radway has not the least bearing upon this case. I agree with what my Lord C. J. Gibbs says there, and with what my Lord C. J. now has said in this case, as to the ques-

tion of favor, when the party has been guilty of laches.

Burrough, J. We know nothing of the length of standing of this case; it may be fifty-nine years, or it may be only twenty-one. The knight who is unable to come here, is, as it were, dead in law, because he cannot attend his duty; and the case must be adjourned till some day in the next term.

BEST, C. J. Let a day be given from Easter-day in three weeks. The case was then adjourned accordingly.

Bosanquet, and Taddy, Serjts., for the demandant. Vaughan, and Wilde, Serjts., for the tenant.

[Attornies—Hallett & H., and Lane.]

*SITTINGS AT WESTMINSTER, AFTER MICHAELMAS [*198 TERM, 1825.

CHILD v. GRACE.

In an action of assault, what was said by the magistrate to the plaintiff at a previous investigation of the circumstances before him, cannot be received in evidence at the trial on the part of the defendant, unless it drew any observations in reply from the plaintiff.

Assault. Pleas-Not Guilty, and non assault demesne. The plaintiff having proved an assault,

Taddy, Serjt., for the defendant, opened, that he should offer evidence of what was said by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant.

Wilde, Serjt., objected that what the magistrate said could not be evidence. Taddy, Serjt. What is said in the presence of the plaintiff is strictly evidence.

BEST, C. J. If such evidence is allowed, we shall have causes tried at the police offices, before they come here. What was said by the defendant to the plaintiff may be evidence, but not what was said by a third person. Or if that which was said drew any answer from the plaintiff, then that makes it evidence, otherwise it is not. I remember Gibbs, C. J., adopting the same distinction when he occupied this seat.

Taddy, Serjt. The not making an answer may, under some circumstances.

be quite as strong as the making one.

Best, C. J. Really it is most dangerous evidence. A man may say, this is impertinent in you, and I will not answer your question. You are driving at the opinion of the magistrate, whereas it is for the jury to form their opinion.

*I never will receive such evidence, unless, as my Lord Kenyon used to say, the twelve Judges in the House of Lords tell me that I must.

Verdict for the plaintiff.

Wilde, Serjt., and Abraham, for the plaintiff. Taddy, Serjt., for the defendant.

[Attornies-Mayhew, and Griffin.]

SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1825.

DICKINSON et al. v. GOOM and BARNES.

In an action on a joint contract against two defendants, an arrangement proposed by one defendant that each should pay a moiety of the damages, cannot be made, unless the other defendant consents, either in person or by counsel, although it is a relief of such defendant, who might otherwise have execution taken out against him for the whole.

Acrien for not accepting a quantity of gum. The defendant Goom made no defence.

Vaughan, Serjt., when the joint contract of the two defendants had been proved, proposed that an arrangement should be made, by which Barnes should pay one half, leaving the other half to be paid by Goom.

BEST, C. J. I cannot allow of this arrangement. Goom is not here to con-

sent. I must send the case to the jury.

Vaughan, Serjt. It is in relief of Goom.

BEST, C. J. I cannot help that. He must consent, or the case must go on. Goom himself not being present, his attorney instructed counsel on his behalf, who consented to the arrangement, and the verdict was taken against both defendants for the whole; the parties entering into a rule that execution \$105.1 *should be taken out against each defendant for one moiety only.

Adams, Serjt., and Moody, for the plaintiff.

Vaughan, Serjt., for the defendant Barnes.

Payne, for the defendant Goom.

[Attornies—Alliston & H., and Carter & A.]

TAYLOR v. FORSTER.

The rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself.

Assumer for goods sold. The dispute in the cause was, whether or not an actual sale had taken place.

The clerk to the plaintiff's attorney proved, that when he served the writ on the defendant, upon his own premises, the defendant, pointing to some articles,

said, "there are the goods."

Upon this, the defendant's counsel asked him, whether he did not know from the plaintiff that the defendant had returned the goods, and that the plaintiff had afterwards sent them back.

The plaintiff's counsel objected. It is a privileged communication.

BEST, C. J. Does that extend to an attorney's clerk?

Vaughan, Serjt. I apprehend it does to the whole of his clerks. Attornies must employ clerks—they cannot transact all their business in person.

BEST, C. J. I think it is so.

The question was not allowed to be put.

The plaintiff was afterwards nonsuited.

*Vaughan, Serjt., and F. Pollock, for the plaintiff.

Justice, for the defendant.

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[Attornice-Cousins & H., and Fisher & S.]

In the case of Du Barre v. Livette, Peake, N. P. C. 78, cited in Wilson v. Rastall, 4 T. R. 756, it was held, that the person who interpreted between the attorney and client, was in the same situation as the attorney in this respect; and in Parkins v. Haukshes, 2 Stark. 239, the same was held as to communications between the defendant and the agent of the defendant's attorney.

JONES v. STROUD and Wife.

A witness has no right to refresh his memory with a copy of a paper made by himself six months after he wrote the original, although the original is proved to be so covered with figures that it is unintelligible; the original paper having been written mear the time of the transaction.

SLANDER. The witness who proved the words, read them from a paper which he acknowledged was a copy of an original memorandum; he said, that he made the memorandum very near the time when the words were spoken, and the copy about six months after. The original paper could not be found. The witness said, that he had given it to the plaintiff's attorney. The attorney admitted, that he had seen it; but stated, that he had returned it almost immediately to the witness. And he added, that it was unintelligible, being almost covered with figures.

The defendant's counsel objected to the witness's refreshing his memory

from the copy.

Adams, Serjt., for the plaintiff. I submit, that the witness has a right to refresh his memory with the copy, as it appears in evidence that the original paper is mutilated.

BEST, C. J. I am quite clear, that he has no such right. He can only look

at the original memorandum made near the time.

After searching in his pockets for some time, the *witness discovered the original paper. From the copy, and also from his own memory when forced to put up the copy, he had proved the words as all addressed to the plaintiff; but when he came to look at the original paper, he acknowledged that part of them were spoken of him. This created a variance; the words in the declaration having all been laid as spoken to him.

BEST, C. J., observed, I remember a case tried before me, in which a witness proved, from memory, an unconditional promise of marriage. I perceived him searching his pockets for a paper, which, when found, I asked to look at. I saw from it, that the promise was qualified by a condition, and corresponded with the terms of the declaration. He said, the paper had been made that morning. The first thing I did was, to call the plaintiff, and the next to commit the witness. A man's life and property would be in a wretched situation, if evidence of the description attempted to be introduced to-day were to be allowed. The importance of seeing the original paper in this case is clearly shown; for, without it, the witness proved that all the words were addressed to the plaintiff; and from the paper it appeared, that great part of them were spoken of him, and addressed to others. On this variance, the plaintiff must be called.

Adams, Serjt., for the plaintiff.

Vaughan, Serjt., and Abraham, for the defendant.

[Attornies-Gray, and Sandom.]

*198] *ADJOURNED SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1825.

DREW v. DURNBOROUGH.

The fact of a letter having been sent to a woman some years before ner death, is not sufficient to raise a presumption that such letter is in the custody of her executrix three or four years after, as the testatrix might have destroyed it in her lifetime.

Issue from the Vice-Chancellor. In the course of the cause, it appeared that a letter, bearing on the matter in dispute, had been sent to a Mrs. Chamberlane, (whose executrix the defendant was,) some years before her death, which took place in 1820.

Vaughan, Serjt., for the plaintiff, submitted, that the having traced the letter into the hands of the testatrix, was sufficient to raise the presumption that it

was in the possession of the executrix.

BEST, C. J. I am inclined to think that it is not sufficient. Have you any case upon the point? I never knew the doctrine carried so far before. The letter might have been destroyed before the death of the testatrix.

Vaughan, Serjt., for the plaintiff.

Taddy, Serjt., and Andrews, for the defendant.

POPLETT v. STOCKDALE.

A printer cannot recover against a publisher for printing a work which contains the life of a prostitute, and the history of her amours with various persons; and it is no answer that the parties are in part delicte.

Whether a witness, called on behalf of a plaintiff to prove an agreement, who admits on his cross-examination that the signature to the agreement is his and not the plaintiff's, can be asked whether he signed it on behalf of the plaintiff and as his agent—Quere.

The declaration stated that, in consideration that the plaintiff would print for the defendant a book called "The Memoirs of Harriette Wilson," the defendant undertook *to pay a certain price weekly, and the balance, on ceasing to employ him, by an acceptance at three months. That the plaintiff printed a part of the work, and on the 16th April, the defendant ceased to employ him; but neglected to give an acceptance for the balance, notwithstanding a bill had been drawn for the amount. Plea—The general issue.

There was a written agreement, containing the terms mentioned in the declaration. There were two parts of it, one signed by the defendant, and the other signed "J. J. Poplett." The plaintiff's son, who was called as a witness for the plaintiff, admitted, on his cross-examination, that the signature was his writing, and not his father's. In his re-examination he was asked on whose

behalf he acted in the transaction with the defendant.

Wilde, Serjt., objected. There is now a perfect contract before us, and we must look at the face of it to see by whom it was made.

BEST, C. J. Such questions are asked constantly in the city, in the cases

of contracts signed by brokers.

Wilde, Serji. In those cases the circumstance of its being a broker who makes the contract, makes a difference, because a broker cannot act as a principal. If this course of proceeding is allowed, a party is turned into a witness who ought to be made a plaintiff.

BEST, C. J. My brother Wilde's observations are entitled to great weight. The question comes very near the city cases, and is of considerable importance.

I will therefore reserve the point.†

Evidence was given of the printing being done, and of the defendant's refusal

to accept the bill.

*Wilde, Serjt. A court of justice was never engaged in a more unseemly object than in enforcing a demand on account of one of the most scandalous and indecent works that ever issued from the press.

BEST, C. J. I know nothing of this work; but you have stated enough to make me say, that I am bound to inquire into the nature of it, and see whether

it is a thing that can properly be charged for.

Several of the numbers were handed up to his Lordship, which had advertisements printed on the outside covers, of the following description:—"The marriage ceremonies and intercourse of the sexes in all ages." "Exhibits in parts 4, 5, and 6, the King, the Duchess of York, Prince Esterhazy, the Duke of Argyle," &c.

His Lordship, upon this, remarked to Serjt. Vaughan—From what I have seen of this work, does it not contain the life of a prostitute, and the history

of her amours with various persons?

Vaughan, Serjt. It would be affectation to deny that such is the nature of the work.

BEST, C. J. Then I have no hesitation in saying, that no one who assists in putting forth this work to the public is entitled to recover in any Court of Justice. He who lends himself to that which is contrary to the laws of the country, cannot complain of not being paid for lending himself to that criminal

[†]In consequence of the result of the trial, any motion upon this subject became unsecessary.

purpose. Every servant, to the lowest engaged in such a transaction, is prevented from receiving compensation. There is a double object in this infamous publication. 1st. The enticing of youth; and 2dly, The extorting money. I am only sorry that I have no power to punish the parties concerned. All I can say is, that I will not consent that either of them shall recover *any thing in a British Court of Law. I have only further to observe, that I will call the plaintiff.

Vaughan, Serjt. Does your Lordship think that this objection lies in the

mouth of Mr. Stockdale—that late repentant sinner?

BEST, C. J. Yes; in the mouth of anybody. Lord *Kenyon*, who was in the habit of expressing himself strongly, said, that he would never take an account between two men, where business was transacted upon *Hounslow Heath*; and I am of opinion, that this is a very similar transaction.

Nonsuit.

Vaughan, Serjt., and Chitty, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies-Webb, and Neele.]

In the case of Law v. Hedson. 11 Es. 300, it was held, that the plaintiff could no recover the price of a quantity of bricks sold by him to the defendant, because they were of less dimensions than are required by the stat. 17 Geo. 3, c. 42. And it was decided in the case of Girarday v. Richardson. 1 Esp. N. P. C. 13, that a plaintiff could not recover for lodgings, knowingly let to the defendant for the purposes of her prostitution. And in Reward v. Hedges, 1 Selw. L. N. P. 68, that the keeper of a house of ill fame could not recover against a woman of the town, for board and lodging furnished to her. See also the case of Steckhale v. Onwhyn, ante, p. 163 and the notes to that case.

TILK v. PARSONS.

In an action for slanderous words, charging a baker with using adulterated flour, if the declaration allege as special damage that several persons (naming them) discontinued to take his bread. The person of whom they used to buy it cannot be asked what reason they gave for ceasing to take it any longer; but the persons themselves must be called to prove their motives.

SLANDER. The declaration stated, that the plaintiff carried on the trade of a baker, and that the defendant spoke of him words imputing that he had been fined *400l. for using Plaster of Paris in his bread; and proceeded to state, as special damage, that several persons named, discontinued buying his bread.

The words were proved, and to make out the special damage, a person was called, who kept a shop at which the plaintiff's bread was sold; and having proved that certain persons whom he was in the habit of serving with the plaintiff's bread, refused to purchase it any longer—

The plaintiff's counsel wished to ask him whether they assigned any and

what reason for such refusal.

BEST, C. J. That question cannot be asked. You might call these customers, who are named in the declaration, and might ask them on their oaths, what was the reason of their not continuing to buy the plaintiff's bread; but I am clearly of opinion, that what they said to the salesman is not evidence.

Verdict for the plaintiff.—Damages, 201.

Vaughan, and Taddy, Serjts., and Campbell, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies—Caston, and Fielder.]

*ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1825.

ENDERBY et al. c. CORDER.

An agreement was made, by which the funds of a bankrupt's estate were assigned to a certain person, who was to secure 5s. in the pound to all the creditors; in consequence of which the proceedings under a commission which had issued were to be stayed. The agreement contained a clause, making the arrangement void if any creditor, whose debt was above 10l., should refuse to come in. A deed was afterwards prepared, in which however a similar clause was not inserted. The deed contained a release, but recited the circumstances as a consideration. Held, that promissory notes, given, in pursuance of the agreement, to a creditor who executed the deed, could not be sued upon by him, it appearing that the commission went on, and the funds were withdrawn from the hands of the maker of the notes, in consequence of the refusal of one of the creditors to execute the deed, and enter into the arrangement.

Assumes on two promissory notes, dated 6th June, 1822, at four months, expressed to have been given on account of John Thompson's estate. Plea —The general issue.

It appeared, that, on the 4th May, 1822, a commission of bankrupt was issued out against John Thompson; and on the 7th of that month, a writen agreement was entered into between the defendant and the creditors of Thompson; by which the defendant and one Cleasby were appointed trustees of Thompson's estate, and the funds were to be vested in them; the defendant was to give his promissory notes for the amount of 5s. in the pound, and the

commission was not to proceed.

There was a clause in the agreement, that in case any of the creditors having debts above 10l., should refuse to come in within fourteen days from its date, the agreement should be void. This agreement was signed by the plaintiffs and the rest of the creditors, with the exception of a person named Garforth, a creditor to the amount of 150l. A deed was afterwards prepared, which embodied the terms of the agreement, with the exception of the clause respecting the effect of all the creditors not coming into the arrangement. It also contained a release, but set out the circumstances as a consideration. This deed was signed by the plaintiffs, and several others of the creditors.

Garforth proved, that he refused to come into the *arrangement, and that the agreement was tendered to him for signature, but not the deed.

When Garforth's refusal to accept the composition was known, the defendant gave notice to the attorney who was getting the deed executed, not to proceed any further; but this was after the plaintiffs had executed it, and these notes had been delivered to them. The commission of bankrupt was afterwards prosecuted; and, in consequence, the defendant paid over the funds he had received to the messenger under the commission, which were afterwards paid over to the solicitor of the assignees.

Taddy, and Wilde, Serjts., for the defendant, contended, that, upon this state of facts, the plaintiff was not entitled to recover. The agreement, and the terms of the notes, show that the consideration has failed. If the notes had got into the hands of a third person on a bona fide consideration, we should have no defence; but now, as against the plaintiff, we have a very good one. It is impossible to collect all the creditors together. It has been solemnly decided, that if a fine be levied, and a recovery is suffered half a year after, or more, it is to be considered as all one transaction. How much more should it be so in the present case, as applied to the agreement and the deed? The commission

has actually gone on, and the funds have been withdrawn from the defendant's hands; and if the plaintiff recovers now, he will have the money in two ways. The deed is not made void, because it is not to be executed by the creditors, except they all agree. The parties went on executing the deed, on the supposition that the whole of the creditors would execute the agreement. The deed was not to come into operation, until the clause in the agreement should be

performed.

Vaughan, Serjt., contra. This can be no legal bar. We are here to look only at the deed; unless we can recover now, we have no remedy at all. The deed is a perfect *release of all claim on the part of the plaintiffs. If it is said, that they are remitted to their original claim, to that I answer, that if they were to bring an action, the deed might be pleaded as a release. The consideration has not failed—it was that they should release the estate—they have done so, and the debt is extinguished. The agreement, in point of law, is merged in the deed as the more solemn instrument. They should have had a similar clause in the deed to that in the agreement, and the deed should have been tendered to Garforth. The case of Holmes v. Love, 3 B. & C. 243, decides, that they should show that both the agreement and the deed were tendered for execution. If the deed is to be binding upon the plaintiff, surely it ought to be binding upon the defendant also. The deed witnesses, that in consideration of the assignment made to the defendant, and the promissory notes given by him, &c., the creditors, parties thereto, do severally and respectively remise, release, and for ever quit claim to the bankrupt. Now, this is not prospective.

BEST, C. J., in his summing up, said, It appears, that these creditors by the deed released the bankrupt; but the question will be, whether that release is not controlled by the other parts of the deed. One question will be, whether the execution of the deed was improperly stopped by the defendant; for if he changed his mind, and did not use due diligence to get the creditors to execute, it will be his own fault, and he cannot set it up now as a defence. I agree with the case decided in the Court of King's Bench; but all that is there laid down is, that it is not enough to produce a deed, and say, we do not find the signature of the creditor; but you must go further, and show that he actually refused to execute it. If you think that no means which the defendant could have used would have induced Mr. Garforth to relinquish his refusal, then I am of opinion, that the defendant is entitled to a verdict. I am not aware of any case decided on this precise *question. If the defendant has acted bona fide, he has a good defence in point of morality; for the property has been taken from him on an event contemplated by all parties. No doubt the agreement is merged in the deed. My present opinion is, that, looking at the whole of the deed, the other parts of it control the release. I am also of opinion, that the deed and the giving of the notes must be taken to be one trans-The understanding of the parties must have been, that the notes were not to be acted upon, unless the defendant retained possession of the funds. No man alive contemplated that the defendant was to pay out of his own pocket.

The jury, however, found for the plaintiffs, saying, that they thought the defendant had not used due diligence in endeavoring to get.

Mr. Garforth to execute the deed.

In the ensuing *Hilary* term, *Taddy*, Serjt., obtained a rule *nisi* for a new trial; which, after argument, the Court made absolute, considering that the Vol. XII.—67

Lord Chief Justice was correct in his opinion at the trial, and that the verdict found for the plaintiffs was not satisfactory, under all the circumstances.

Vaughan, Serjt., and Richards, for the plaintiffs. Taddy, and Wilde, Serjts., for the defendant.

[Attornies—Buxendale, T. & U., and B. Lewis.]

See the case of Johnson v. Baker, 4 B. & A. 440.

*JOHNSON v. BAKER.

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A demand for mourning furnished to the widow and family of a deceased person, is not a "funeral expense," and cannot be claimed against his estate by the executor if he gives the order, and by consequence a legatee who has not received his legacy, is a competent witness on the part of the executor, in an action brought against him for the receivery of such demand.

Assumpsit for goods sold. 'The defendant was the executor of a Mr. Whitehead, and the demand was for mourning furnished to the widow and family of the defendant's testator.

One of the testator's sons was called as a witness for the defendant. He admitted that he was entitled to a legacy under the will, and that he had not received it.

He was objected to on the part of the plaintiff, as an interested witness; because it was the object of his testimony to prevent the estate being charged, out of which his legacy was to be paid.

On the part of the defendant it was contended, that there was no objection to his testimony, as the executor, if compelled to pay the demand, must pay it

with his own money, and could not claim it against the estate.

For the plaintiff it was replied, that the argument used would only apply in the case of a contest between creditors, and not where, as in this case, there were ample funds to pay all demands on the estate. It was also urged, that this demand might come under the description of funeral expenses, which an executor was bound to pay.

BEST, C. J., was of opinion that it was not a funeral expense, and that the executor could not claim against the estate, if compelled to pay; and therefore

he decided, that there was nothing in the objection.

Verdict for the defendant

Lee, for the plaintiff. Comyn, for the defendant.

[Attornies—Steel & Nicol, and Sheppard, T. & L.]

*CROWDER v. AUSTIN.

The owner of a horse sold by auction, has no right, under the usual condition of a sale, that "the highest bidder shall be the purchaser," to employ any person to bid for him for the purpose of enhancing the price; and if he do so, he cannot recover the purchase money from the buyer.

Assumpsite for the price of a horse. The horse was sold by public auction, at which the plaintiff's groom attended and bid. Another person, not connected with the plaintiff, also bid; but his bidding did not go beyond the sum of twenty-three guineas. The horse was knocked down to the defendant at twenty-nine guineas. The printed conditions of sale were given in evidence, from which it appeared that the highest bidder was to be the purchaser.

BEST, C. J., upon this, inquired of Spankie, Serjt., if he thought the action

could be maintained.

Spankie, Serjt. Yes, my Lord; I think there is no puffing to impose upon

the purchaser.

Best, C. J. I am clearly of opinion, that the action cannot be maintained. I have long been surprised that the objection has never been taken. A man goes to a sale, and is told that if he is the highest bidder he shall have the article. He bids a certain sum, and a person (employed by the seller) whom he does not know, attends and puffs against him, and in consequence of that, he is compelled to pay a much larger price than he would otherwise have paid. Is not this a gross fraud? I am prepared to nonsuit the plaintiff.

Spankie, Serjt. There is a case which decides, that a seller has a right to have one person to bid for him at the sale, if he does not do it in order to

impose.

BEST, C. J. I agree that he has such right; but then he must declare it by

the conditions of sale.

*209] Spankie, Serjt., then proved, by the evidence of the *auctioneer, that the defendant was in the habit of attending at sales of horses, and that

be knew that the plaintiff's groom was present at the sale in question.

Best, C. J. I am of opinion that the plaintiff cannot recover in this action. The conditions of sale are, that the highest bidder is to be the buyer; and no leave is reserved for the employment, either openly or covertly, of any person to bid for the seller. I am of opinion, that a seller acts in opposition to the conditions of sale, if he employs a person to bid, for the purpose of enhancing the price. In this case the other person at the sale did not, in his bidding, go near the ultimate sum. It is impossible, under these circumstances, to say that the price of twenty-nine guineas was the highest price contemplated by the conditions: for the defendant, under them, was entitled to have the horse at the next highest bidding to that of the only fair bidder. I am of opinion, that the plaintiff must be called.

Nonsuit.

Spankie, Serjt., and F. Kelly, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies—Crowder & M., and Harman.]

In the ensuing *Hilary* Term, *Wilde*, Serjt., moved to set aside the nonsuit; and argued to the following effect. A Court of Equity would enforce such a contract; and as a matter of law, it is not avoided by such a proceeding as is called puffing. Puffing is not, in point of law, by itself a fraud upon a buyer,

but may become so if coupled with other circumstances. If a practice is nowrious, and well understood, no buyer is deceived by it, and though an old case may have decided, that, some years ago, it was unknown, and therefore fraudulent, it does not follow that it must be so now. It should have been left w the jury to *say whether, in this case, the party was taken by surprise. As to the condition that the highest bidder shall be the purchaser, the statute of 17 G. 3, cap. 50, s. 10, gives a bonus, by a reduction of auction duty, to an owner of an estate, who becomes the purchaser of it; which would not have been done if the legislature had thought it fraudulent for a man to bid for The case of Howard v. Castle, 6 T. R. 642, which is called his own estate. a leading case on the subject of puffing, has been frequently adverted to since, and its effect stated to be, not that the attendance of a puffer on the part of the owner, avoided the sale; but that because there were no other bidders, the sale was no better than a mock auction. Lord Rosslyn, in Connelly v. Parsons, 3 Ves. junr. 625, in a note to the case of Bramley v. Alt, refers to a case of Bexwell v. Christie, Cowper, 395, and observes, that " the acts of Parliament imposing a duty on the sales of estates by auction, go upon its being a usual and a fair thing for the owner to bid;" and in the same case, his Lordship said, that he felt vast difficulty in compassing the reasoning that a person does not follow his own judgment because other persons bid; and that the judgment of one person is deluded and influenced by the biddings of others. In the case of Bramley v. Alt, Lord Alvanley, then Master of the Rolls, concurred with Lord Rosslyn, and considered the case of Howard v. Castle only as a decision, that where all the bidders, except the purchaser, are puffers, the sale shall be void. The circumstance of a practice being generally known, excludes the necessity of giving any personal notice. A party is bound to know the practice, if he is in that course of dealing. What is done, is done to protect the property, and is not, like swindling, bad per se. The practice, also, is always allowed in the case of sales by trustees for infants.

Burrough, J. Is there not a difference between a sale by trustees in Chan-

cery, and a sale at common law.

*Wilde, Serjt. That is only illustration; the decisions go upon the [*21]

general principle.

BEST, C. J. My own opinion remains what it was at Nisi Prius; but it is a question of very general importance; and it is fit, before we lay down a rule which may affect every sale in the kingdom, that we should have the matter argued and considered. Not that I think that any judge will be found eventually to sanction the practice.

PARK, J. I, for one, do not think that a rule ought to be granted; but if any single judge is of a contrary opinion, the matter ought to be discussed. The opinion of Lord *Mansfield* is not a mere dictum, but a long elaborate judgment; and he was followed by Lord Kenyon, in a case of Blackford v.

Preston, 8 T. R. 93 & 95.

Burrough, J., expressed himself of the same opinion.

GAZELEE, J. I do not feel prepared, on the sudden, to decide a case of so great importance, and particularly as there have been differences of opinion on the point.

A rule nisi was accordingly granted; which, when it came on for argument, was not supported by Wilde, Serjt., and therefore the Court ordered it to be

Discharged.

SALMON v. WARD.

In sn action on the warranty of a horse, letters passing between the plaintiff and defend ant, in which the plaintiff writes, "You well remember that you represented the horse to me as a five year old," &c., to which the defendant answers, "The horse is as I represented it," are sufficient evidence from which the jury may infer that a warranty was given at the time of the sale; and it is not necessary to give other proof of what actually passed when the contract was made.

Assumpsit on a warranty of a horse. No direct evidence was given of any thing that passed at the time when *the contract was made; but some letters were put in, one written by the plaintiff, which contained these words: "You well remember that you represented the horse to me as a five year old," &c.; and one from the defendant in answer, which stated, inter alia, "The horse is as I represented it."

Spankie, Serjt., for the defendant. They have not proved the warranty in the declaration, which is express. They must show a distinct warranty, and not piece it out by a parcel of letters. Warranty, means a warranty at the time

of sale.

BEST, C. J. The question is, whether I and the jury can collect that a warranty took place. I quite agree, that there is a difference between a warranty and a representation; because, a representation must be known to be wrong. No particular words are necessary to constitute a warranty. If it were so, there would be more tricks in horse causes than there are at present. If a man says, this horse is sound, that is a warranty. The plaintiff, in his letter, says, "you remember, you represented the horse to me as a five year old." To which the defendant's answer is, "the horse is as I represented it." Now, if the jury find that this occurred at the time of the sale, and without any qualification, then I am of opinion, that it is a warranty. If it occurred before, or if it was qualified, then it must be taken to be a representation, and not a warranty. His Lordship then left the question to the jury, telling them, that if they found that the defendant at the sale gave an undertaking to the effect mentioned in the letters, then, in his opinion, such undertaking was a warranty.

Verdict for the plaintiff.

Vaughan, Serjt., and Abraham, for the plaintiff. Spankie, Serjt., for the defendant.

[Attornies—Heming & B., and Stocker & D.]

*213] *BLEASBY et al., Assignees of BYERS, a Bankrupt, v. CROSS-LEY et al.

If a trader deny himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonored, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him.

If one lend another a check for 100%, such check is not evidence of a good petitioning creditor's debt, unless it be proved that it was paid.

Assumpsit for money had and received, to the use of the plaintiffs as assignees.

In order to prove an act of bankruptcy, the bankrupt's porter was called,

who stated, that, in the month of August, 1824, a person of the name of Clarke, called at his master's house, and asked if his master was within, and desired that he might be told that Jackson's bill was dishonored, and that he (Clarke) wanted to see him; that the witness informed his master, who desired him to say that he was not in town; that upon this message being delivered to Clarke, he disputed the witness's word, and went up stairs towards the drawing-room in which the bankrupt was; and the bankrupt made his escape from the drawing-room, and went into a bed-room up another flight of stairs; in consequence of which, Clarke did not see him.

To prove the petitioning creditor's debt, a witness was called, who stated, that the bankrupt, on the 19th of July, can e to Mr. Smith, the petitioning creditor, and obtained from him his check for 100l. to take up a bill which was coming due on the 20th. But the witness added, that the bankrupt gave Smith

in return his own check to the same amount.

It appeared, that Messrs. Sikes & Co. were the bankers of Byers, and that the check in question had their name written across it. A clerk in Sir Peter Pole's house, on whom it was drawn, proved, that they would not, under those circumstances, have paid it to any one but Sikes & Co. The clerk to Sikes & Co., who was present at the trial, was not able to prove, from any entries in his own handwriting, that the check was paid, or that Byers had credit for it at the time when it was received. It was produced by the plaintiffs, the assignees, Smith (the petitioning creditor and drawer of it) being one of them.

*It was contended by *Vaughan*, Serjt., that the circumstances of the name of *Sikes & Co*. being written across it, and its coming out of the hands of the plaintiffs, were *prima facie* evidence of its having been taken up and paid.

BEST, C. J. You must show that, on the day on which the check is dated. Byers had credit with Sikes & Co. to the amount of 100l., or that it was paid. Cross, Serjt., instanced the case of an acceptance, which had got back into

the hands of the acceptor.

BEST, C. J. There is no doubt as to an acceptance delivered out, and after-

wards got back.

Cross, Serjt. That is precisely our case. We show a delivery of the check, and that it is back again in our hands as if satisfied; and that is prima facie evidence of payment, and makes it necessary for the other side to show something improper in the getting it back, or that in fact it was never paid.

Stephen. Checks, according to the London practice, are money; and the

check in question must be taken to be so, unless the contrary is shown.

BEST, C. J. I will not stop the cause, but will give leave for a motion to the Court.

His Lordship left it to the jury to say, whether Byers considered Clarke to be a creditor; and the jury found that he did.

Verdict for the plaintiffs. Vaughan, and Cross, Serjts., and Stephen, for the plaintiffs.

Spankie, Serjt., and Wightman, for the defendants.

[Attornies-Chester, and Milne & Parry.]

*In the ensuing Hilary Term, Wilde, Serjt., obtained a rule nisi for entering a nonsuit, in pursuance of the leave given at the trial; which rule, after argument, the Court made absolute; being of opinion, that although the act of bankruptcy was sufficient, there was not proof of a petitioning creditor's debt, because it did not appear, from the evidence, that the check had ever been paid.

SNOW et al. v. PEACOCK et al.

If a banker in a small market town change a 5001. Bank of England note for a stranger, without any further inquiry than merely asking his name, he is liable in trover to a party from whose possession such note had been unlawfully obtained; and the question in such case is not, whether there was an honest holding on the part of the defendant, but whether, under the circumstances, there was a want of the continue.

but whether, under the circumstances, there was a want of due caution.

The plaintiff, however, in such case, must show that he has done every thing which in reason he ought. A dividend warrant was paid into a banker's by a customer. The bankers sent it by a porter of the house to the Bank of England, to get cash for it: he returned without the money, saying he had been robbed of it. Held, (the porter himself being dead,) that proof of those facts was sufficient evidence of possession on the part of the bankers, to enable them to maintain trover for a 5001, note, part of the money, against a party into whose hands it had come, under circumstances which would not entitle him to retain possession of it.

TROVER for a Bank of England note for 500l. Plea-General issue.

The plaintiffs were bankers in London, and the defendants carried on the same business at Sleaford in Lincolnshire, having also a branch bank at

Bourne in the same county.

A clerk from the office of the auditor of public accounts, produced a dividend warrant; and a clerk of the plaintiffs proved, that the dividend warrant produced had been paid to their house on the 7th of September, 1824, by a customer of the name of Lake;—that it was given on the next day to a porter of the house, who had been in his situation a great many years, to take it to the Bank of England, in order to get the money for it; that the porter returned to the plaintiffs' without the produce, and said that he had been robbed in Fleet Street; and also that the porter had died three or four months before the trial. This witness further stated, that it was the practice of London bankers never to change a note for a stranger, without first making some inquiries.

*One of the clerks in the Bank of *England* proved, that on the 8th of *September*, 1824, he paid the dividend warrant produced, and mentioned the dates and numbers of the notes with which he paid it, among which, were the date and number of the note in question. This witness added, that the Bank of *England* require the name and address of the party presenting a

note, before they give change for it.

A clerk of the defendants, who was in their bank at Bourne, proved, that Bourne was a small market-town; and that on the 13th of April, 1825, at 11 o'clock in the morning, about two hours after the arrival of the London mail, a person respectably dressed, and apparently about sixty years of age, came into the bank, and asked him to change a Bank of England note for 500l.—that he asked first to have it changed for smaller Bank of *England* notes; but, on being told that it was not the practice of the house to give change in that way, consented to take the notes of the Sleaford Bank;—that he had no previous knowledge of the man, and had never seen him since;—that he sent the note by the next night's post to the defendants' correspondents in London, Messrs. Houre, Barnett & Co., in account with whom the defendants had credit for it; and that it was only one night's post from Bourne to London. On his cross-examination he said, that it was the defendants' course of business to issue their own notes for value; that he asked the man his name, and received for answer, that it was Edwards, and that there were a number of fairs held in adjacent parts about the time in question. On his re-examination he admitted, that generally in the country 500% notes are only in circulation amongst bankers. And in answer to questions from the jury, he acknowledged, that, although he had been in the defendants' employ for a period of eleven years, he had never before changed a larger note than one for 100l.

It was proved, that, in September, 1824, three hundred placards giving notice of the robbery, were stuck up in *London and the vicinity, and between seventy and eighty handbills were distributed amongst the bankers in

the city. The loss of the note was also advertised in the Morning Adver-

tiser newspaper, and in "The Hue and Cry."

The wife of the printer of the latter paper, proved that it was sent by order of Government to various magistrates and others, and that fifty were generally sent into the county of *Lincoln*.

The defendant's clerk was again called, and stated that the defendants did not take in the *Hue and Cry* at their banking houses; but he admitted that one

of them, Mr. Handley, acted as a magistrate for the Bourne division.

Spankie, Serjt., objected. This is not proof of Mr. H.'s being a magistrate.

BEST, C. J. I think, proof that a man acts as a magistrate is proof of his being so in any case.

Spankie, Serjt. But some men are magistrates who never act at all.

BEST, C. J. Then you must produce the commission, because you can have no other evidence.

A clerk in the Bank of *England* then proved, that on the 8th of *September*, 1824, application was made at the Bank to stop the note in question; and that if after that day inquiry had been made by any person, information of the fact

might have been obtained.

For the plaintiffs, it was argued, that the defendants, under the circumstances, ought not to have changed the note, but should have made inquiries on the subject; they had not exercised proper caution, considering the amount of the note, and the circumstance of the place where it was changed being a small market-town. London *bankers, it was said, will not change a note for a person whom they do not know; and, a fortiori, a country banker ought to make inquiries. The authorities cited were Solomons v. The Bank of England, 13 East, 135; Gill v. Cubitts, 5 Dow. & Ry. 324; and Egan v. Threllfall, mentioned in a note to that case.

Spankie, Serjt., for the defendants. This action cannot be maintained by the present plaintiffs. They declare on their possession in trover. The dividend warrant was put into their hands merely to receive the money for Lake, who was the real owner. Trover and trespass are very different. This note never reached their possession at all. There is no evidence how it was lost; it had disappeared for seven months; it never came into their possession. They have not established any property, direct or indirect. They have not shown any felony committed. They must show general or special property, and that the note continued in their possession up to the time of the conversion.

Best, C. J. There is no occasion to prove the commission of a felony, but only that the note was improperly got from the plaintiffs' possession, if they were entitled to it. The porter must either have been robbed, or have embezzled it himself. Admitting that it never was in their possession, yet trover is maintainable if the party has property. The possession of my servant is my possession. This appears from the case of the butler who was convicted of stealing his master's plate while it was in his own custody. Constructive possession will maintain trover. Bankers are in the habit of receiving plate for safe custody, but the property is in the customer who deposits it, and the banker cannot touch it. But if I send money to him, or he receives it for me, it becomes his property; he is not bound to give me the identical notes he receives of me. And *there is no form of action by which I could compel him to do so.

Spankie, Serjt., then addressed the jury.—If you hold the defendants responsible, you will give a death wound to the circulation of bank notes. Bank notes are as cash, and cannot be followed. If not, no man could take one without making himself liable to an action. The plaintiffs are bound to show not want of caution merely, but fraud and collusion. I agree with the case of

Gill v. Cubitts; but there is a broad distinction between the case of a bank note and a bill of exchange. A man does not take a bill as cash; but he discounts it, and is pro tanto a purchaser, and must look into the title of the person of whom he takes it, and must ascertain it at his peril. But this is not necessary in the case of a bank note. The Liverpool case is one of gross fraud; crassa negligentia is tantamount to fraud, on account of its consequences. It would have been nugatory to make a long string of inquiries, for the party might have easily answered them so as to deceive. Lord Mansfield, in Miller v. Race, I Burr. 452, says, "The whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts. Now, they are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes." It is said, that the amount of the note changed ought to be taken into consideration, but that would be a loose, vague, and dangerous standard of estimation. It would depend upon a man's idea of the value of money. A miser would have one idea, a spendthrift another, and a moderate man a third. A bank note is money, and is to pass without inquiry; and fraud and collusion must be clearly made out, to enable a party to recover *under the circumstances of this case. The Bank cannot compel a person to write his name on a note before they change it. The plaintiffs should have sent the printed bills to all the country bankers. There is no distinction between these defendants and the publican in Miller v. Race, for both were acting in the ordinary course of their business. As to the question of negligence, there were but two things for the defendants' clerk to do. The one was either to have nothing to do with the note, or ask a set of the most nugatory questions that were ever heard of. Besides, if he had asked questions, it would have shown that his mind was alive to suspicion; and then he ought not to be satisfied with the answers he would receive. He must either have stopped the circulation of a Bank of England note, or have stopped the man who presented it for change. It is not incumbent on a party to do more than act bona fide. As to bills of exchange, the rule of caveat emptor applies. Miller v. Race decides, that a case like the present must be bottomed in fraud, and not decided upon a test which varies according to the character, feelings, and conditions of men. The note must have gone out of the plaintiffs' possession by circulation from hand to hand, before it was presented to the defendants, and the possession of the first bona fide holder would divest the possession of the The note had been out seven months, and it cannot be presumed, that it never made its appearance till it was presented to the defendants, and that it never got into the hands of such a bona fide holder. All the cases cited are cases standing on their own circumstances of suspicion; but in this case the parties are all innocent; and which of them is most so? he who has been entrapped into the changing a note, or those who might have sent a printed notice of their loss to all the bankers in the country, if they had merely looked into the lists, and taken the trouble to find out their directions?

BEST, C. J., in his summing up, said, It appears to me "that the only safe rule in cases of this sort, is the rule which is laid down in Gill v. Cubitts, viz. to see whether all the parties have acted with due caution. 1st. Whether the plaintiffs have done all that could be reasonably expected of them; for if they have not, they cannot recover. And secondly, if they have, whether the defendants have done so too. As to sending the Hue and Cry, the witness said, that the publisher had not the power of sending it without an order from the police. There may be wise reasons for that, and it does not appear to have been done in any of the other cases. I will not submit the question to you on my brother Spankie's principle. The case of Miller v.

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Race does not touch this question. Lord Mansfield does not say, that it is necessary there should always be suspicion; but he argues on the particular facts of the case. The question of caution depends much upon the sum. The party's caution should increase with the amount of the note which he is called upon to change. A man may change a 201. note without asking a single question; but would that be right as to one of several thousands? There is no doubt, that the defendants are most respectable persons. It is important to remember, that the man asked for change in Bank of England notes, but after wards agreed to take those of the defendants' bank. Perhaps the circumstance of getting their own notes into circulation, and the little profit they would thereby acquire, might abate the degree of caution which they would have used under other circumstances. Questions should have been asked, and those questions continued, till suspicion was satisfied. One of the witnesses proved, that it is the practice of London bankers never to change a note for a stranger without first making inquiry. I think the plan adopted by the Bank itself is a very proper caution: but the Bank stands in the situation of a payer, and the country banker is a discounter; and more caution is required in the case of the latter than the former. The question for your consideration is, whether the defendants in this case have used due caution or *not; that is, in other words, whether they took the note in the usual course of business; for the course of business must require, in the usual and ordinary manner of conducting it, a proper and reasonable degree of caution necessary to preserve the interests of trade.

> The jury found for the plaintiffs, observing, at the same time, that no suspicion of unfairness could attach to the character of the

defendants.

Vaughan, and Bosanquet, Serits., and S. M. Phillips, for the plaintiffs. Spankie, Serjt., and Smirke, for the defendants.

[Attornies—Henson & D., and Sandys & Son.]

In the ensuing Hilary Term, Wilde, Serjt., obtained a rule nisi for a new trial, which, after argument, was discharged. The Court being of opinion that the question had been properly left to the consideration of the jury, and that there was no reason for disturbing the verdict.

See the cases of Peacock v. Rhodes, Doug. 633. Grant v. Vaughan, 3 Burr. 1516. Egas v. Threllfall, 5 Dow. & Ry. 326. Greenstreet v. Carr, 1 Camp. 551. Wookey v. Pole, Bart., 4 B. & A. 1, and Kins Esq., v. Milsome, 2 Camp. 5.

*YRISARRI v. CLEMENT.

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If a foreign state is recognized by this country, it is not necessary, to support an allega-tion which describes it as a state, to prove that it is in fact an existing state, but if it be

cient to support themselves in opposition to it.

A bond for foreign stock signed in Paris, but issued in England, does not require a

English stamp.

not so recognized, then such proof becomes necessary, and may be admitted.

If a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have courts of justice, that is evidence of their being a state; and it makes no difference whether they formerly belonged to another country or not if they do not continue to awheremed they formerly belonged to another country or not if they do not continue to awheremed they formerly belonged to another country. or not, if they do not continue to acknowledge it, and are in possession of a force suffi-

A foreigner has no right to negotiate in England a loan for the use of a State, which has separated itself from, and is at war with one of England's allies, (such State not being at the time recognized by England.) without the permission of the English Government; and if a letter in an English newspaper merely animadvert, though in the strongest terms, upon the illegality of such a transaction, it is no libel; otherwise, if it go beyond that, and impute a moral fraud to the party engaged in it.

If in the inducement in a declaration in an action for a libel, two places are described as "States," and in the libel itself allusion is made to one, and the other is actually mentioned under the title of a "neighboring State," it is not necessary that the plaintiff at the trial should prove that either of them were in fact States.

the trial should prove, that either of them were in fact States.

Action for a libel in the Morning Chronicle newspaper. The declaration stated, that the plaintiff, before the time of committing the grievances complained of, had been and was appointed by certain persons exercising the powers or authority of government, in a certain republic or state in parts beyond the seas, to wit, in the republic or state of Chili in South America, to the office or station of Envoy Extraordinary and Minister Plenipotentiary from the said republic or state of Chili, to and at the Courts of Europe, and amongst others to the Court of this united kingdom; and that he had been, and was authorized, empowered, and directed by the said persons exercising, &c., to negotiate a loan or loans for the service of the said republic or state; and also that by virtue and in exercise of the said power and authority, he had entered into, made and concluded for and on the part of the said republic or state, a contract with certain persons, to wit, John Hullett and Charles Widder, for raising a certain loan of money, to wit, a loan for 100,000l. sterling money of this kingdom, for the service of the said republic or state, by the sale of certain bonds or obligations, to wit, bonds or obligations of and on the part of the government of the said republic or state, which said bonds or obligations had been and were signed by him as Envoy Extraordinary, &c., and had been and were issued by him to the said Messrs. Hullett & Co., and had been, and were sold and disposed of by and through their agency to divers subjects of this kingdom, as the buyers and purchasers thereof.

The declaration further stated, that, at the time, &c., one John Hullett, being one of the partners in the said *house or firm of Messrs. Hullett & Co., had been and was appointed by certain persons exercising the powers or authority of government in a certain other republic or state in parts beyond the seas, near or neighboring to the before-mentioned republic or state of Chili, that is to say, in the republic or state of Buenos Ayres, Consul-General for the said republic or state in and towards this united kingdom.

The libel was then set out as having been published in the Morning Chronicle of and concerning the plaintiff, and of and concerning the matters aforesaid. The defendant pleaded, 1st. The general issue. And 2d. a justification; in support of which, however, from the absence of a witness, he did not give any

evidence at the trial.

A witness, who described himself as under secretary of state at Chili, in 1818, proved, that, at that time, it consisted of three provinces, of which two and a half were under the direction of the government from which the plaintiff claimed his authority;—that such government was of a republican form, and had courts of justice in which laws were administered, and that it exercised a power of making laws, which were submitted to by the people of the country. On his cross-examination he admitted, that in the other half province, there was war between the king of Spain and those who had been his subjects, and had declared themselves independent.

An instrument was then offered in evidence, dated in October, 1818; it was signed by Don Bernardo O'Higgins, and Don Joachim Echeverias, the former as supreme director, and the latter as secretary of state for foreign affairs; it was also sealed with a seal, which the witness stated was used and adopted by

the government of Chili.

Taddy, Serjt. There is not sufficient evidence of Chili being a state. This

seal is not such a seal as your Lordship can recognize as the seal of a state. It must have been recognized by competent authority. Your Lordship *can take judicial notice that, in treaties with this country, Chili has been mentioned as forming part of the dominions of the king of Spain.

Best, C. J. It occurs to me at present, that there is this distinction. If a foreign state is recognized by this country, it is not necessary to prove, that it is an existing state; but if it is not so recognized, such proof becomes necessary. There are hundreds in *India*, and elsewhere, that are existing states, though they are not recognized. I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have Courts of Justice, that is evidence of their being a state. We have had, certainly, some evidence here to-day that these provinces formerly belonged to *Spain*; but it would be a strong thing to say, that because they once belonged, therefore they must always belong. We have recognized lately some of these States. It makes no difference whether they formerly belonged to *Spain*, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it. This is my present opinion; but I will give my brother *Taddy* leave to move the Court upon the subject.

The instrument was then read. It recited the necessity of sending a public man to *Great Britain*, and appointed the plaintiff as Envoy Extraordinary and Minister Plenipotentiary. A similar document was put in, appointing the plaintiff Envoy, &c., to all the kingdoms of the old world. Another instrument was then put in, signed by the same parties, and dated 29th *October*, 1818, which authorized the plaintiff to raise money for the State, under such terms as he

should think proper.

A set of special instructions, dated 4th December, 1818, also signed by the same persons, were put in and read. *One of the articles contained a direction that the plaintiff should take care to oppose the Spanish Ministers, by availing himself of the public papers. A contract with Hullett & Co. for the loan, and a mortgage deed, pledging the revenues of Chili, signed by the plaintiff, which had been deposited at the Bank of England, were also put in and read. One of the bonds given to secure the loan was then put in, as a specimen of the rest. It was in the English language, and was proved to have been signed by the plaintiff at Paris, and issued by him to Hullett & Co. who resided in London, and sold by them under their contract.

Evidence was then adduced of the appointment of Mr. Hullett as Consul for Buenos Ayres, and also of the situation of affairs at that place in 1818. It was similar to that given with respect to the plaintiff and Chili, and was met by a similar objection, which was followed by a similar determination, and accom-

panied by a similar leave to move the Court upon the point.

The usual certificate from the stamp-office was put in, to prove that the

defendant was proprietor of the Morning Chronicle.

The libel was then read. It was in the paper of the 23d July, 1825. It mentioned Mr. Hullett's appointment as Consul General to England, and charged him with saddling the republic of Chili (calling it by the name of a neighboring state) with a debt of a million of pounds, for his own benefit; and then went on to accuse the plaintiff, by the name of "The Creole Spaniard," of acting the part of "Plenipo to the Stock Exchange in that affair with Mr. Hullett." There were other accusations in the libel against the plaintiff, which imputed fraud to him in the application of the money raised for the loan.

Taddy, Serjt. There are two allegations which have not been proved; the first is, that which relates to the plaintiff's being Envoy, and Mr. Hullett Consul: there is *no evidence of either of them having acted in those capacities as and towards this united kingdom;—they should have shown

an acceptance by a communication with our government.

BEST, C. J. It is only stated that they were appointed, not that they were;

and they were appointed whether recognized or not. I am of opinion that

there is notning in this objection.

Taddy, Serjt. The other allegation which is not proved is, that which states that certain bonds or obligations were signed by the plaintiff, &c. The bond which was produced as a specimen, was without any English stamp, which it ought to have, inasmuch as it was issued in this country, and is a security for money which is available in this country, and is marketable there; it is meant to circulate in this country, and have its effect in it, and money has in point of fact been actually raised upon it;—and it describes the plaintiff as being resident in London.

BEST, C. J. It is signed by the plaintiff as attorney for the state of *Chili*, and it is operative only in *Chili*. I am inclined to think that it does not require

a stamp.

Spankie, Serjt. It is a receipt for money.

BEST, C. J. I will not stop the cause, but will give leave for a motion to the Court upon the point. If it bound anybody in this country, it would re-

quire a stamp; but it seems to me that it does not.

Taddy, Serjt., then objected generally to the plaintiff's right to recover. The paragraph complained of in this case, relates to an illegal transaction; and as it only attempts to decry the characters of those engaged in such transaction, can it, I would ask, be considered as a libel? *The transaction is clearly illegal, for no loan of this kind can be negotiated here, without the au-

thority or permission of our Government.

BEST, C. J. I have no hesitation in acceding to the proposition, that the transaction was illegal. No foreigner has a right to act as this plaintiff has acted without the permission of our Government; because such a transaction might have involved us in a war with Spain. And if the plaintiff had made any demand, and claimed any right, I should have nonsuited him. I gave a similar opinion in the case of the Greek loan, and my opinion was confirmed by the Court.† If that which is charged as being a libel had consisted merely of observations as to the extreme absurdity and illegality of such transactions, though such observations had been couched in the strongest terms; yet if they were expressed honestly, I should have no hesitation in saying, that the action could not be maintained. But it goes beyond that, and imputes to the plaintiff the commission of a moral fraud; and for such an imputation, I am of opinion that he is entitled to recover.

Verdict for the plaintiff.—Damages, 4001., subject to

a motion to enter a nonsuit.

Vaughan, Serjt., Tindal, and Lysley, for the plaintiff. Taddy, and Spankie, Serjts., for the defendants.

[Attornies—Crossland, and James & W.]

On the first day of the ensuing Hilary term, Taddy, Serjt., moved for a nonsuit pursuant to the leave given, on the ground that the averment had not been
proved, which described Chili as being a republic or state. He also moved
for a new trial on the following grounds: first, that the bond produced at the
*229] trial, though it was signed in *Paris, because it was issued in England,
required an English stamp, and without such stamp, could not be called
a bond. And secondly, that the transaction being illegal, the plaintiff was not
entitled to recover damages.

The Court granted a rule nisi for a nonsuit on the first point, and a rule for a new trial on the third, but refused the application on the second, as to the

necessity of the bond being stamped.

These rules came on to be argued in the course of the same term, and the Court said, that it was not necessary to give any opinion upon the question, whether Chili had been proved to be a state or not; because as it was so called in the libel, that was an admission on the part of the defendant, which rendered it unnecessary to give any proof upon the subject. With respect to the effect of the illegality of the negotiation of the loan upon the plaintiff's right to recover, they thought that the opinion of the Chief Justice, which he gave at the trial, was correct. But they decided on another ground, viz., the incorrectness of some material innuendoes, which was not adverted to at Nisi Prius, and therefore made the rule absolute for a new trial.

'OXFORD SUMMER CIRCUIT.[19200

1825.

BEFORE MR. JUSTICE BURROUGH, AND MR. BARON GARROW.

OXFORD ASSIZES.

REX v. JAMES OGILVIE.

If goods be laid in an indictment as the property of A. W. G., Bsquire, the addition is not material; and if he is not an esquire, it is no ground for an acquittal.

THE prisoner was indicted for stealing two silver spoons, which were laid to be the property of Andrew William Gother, Esquire.

The facts were clearly made out; but Mr. Gother stated on his cross-examination, that he held no office which gave him the rank of esquire, (he being a gentleman commoner of St. John's College,) nor was he so by the king's grant, nor by being the eldest son of a knight.

Shepherd objected, that the property was laid in Andrew William Gother,

Esquire: and so far from that being proved, it was shown that the gentleman whose property the articles were, was not an esquire; which was, he contended, a fatal variance.

BURROUGH, J., overruled the objection, and held, that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage, and immaterial.

Verdict-Guilty.

Cross, for the prosecution. Shepherd, for the prisoner.

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*WILKINS v. WELLS.

If a person take a lad a month on liking, with the intention of his being bound as an apprentice, if he and the lad suit one another, and the lad stay several months without any indenture being executed. If no fresh agreement were entered into, he is not entitled to charge for the board and lodging of the lad whom he employed in his trade, and by consequence he is not entitled to set it off in an action by the lad's father for money lent.

Assumpsite to recover 201., money lent. Pleas—General issue; and a set off for board and lodging of the plaintiff's son.

It appeared that the plaintiff was the butler of Magdalen College, and the defendant a hatter in the city of Oxford; and that the plaintiff wishing to place his son as an apprentice to the defendant, it was verbally agreed between them, that the plaintiff's son should go a month on liking, and if the master and intended apprentice suited each other, indentures of apprenticeship were to be executed, and a premium of 60l. paid. The lad went on liking, and after he had been at the defendant's, who boarded, lodged him, and employed him in his business of a hatter for several months, the defendant asked the plaintiff to abvance him 20l., which he did, (this being the sum in question.) The lad stayed in the defendant's house, and worked in his business for a little more than a year and a quarter, when the defendant turned him away, and refused to receive him, when sent back again by his father. No indentures of apprenticeship were ever executed.

Jervis, for the defendant, contended, that, under these circumstances, his client was entitled to set off the board and lodging of the plaintiff's son against the 201. advanced, the former being of much greater value than 201.; as, after the month of liking was expired, the plaintiff not then causing indentures to be executed, he was liable to pay for the board and lodging of the lad. It was, no doubt, to be said, that the defendant had his services, but the services of a lad of this sort were of no value. Every one knew, that in a seven years' apprenticeship the last years were the only ones of value to the master.

apprenticeship the last years were the only ones of value to the master.

Garrow, B. This is a momentous question for the rising generation, if the defence has the slightest foundation. This lad was intended to have been placed as an apprentice to the defendant, and went on what is called liking for a month. At the end of that month no indentures are executed, and no fresh arrangement come to, but the lad continues to stay with the defendant as before. No agreement was entered into, that the plaintiff should pay for his board, and nothing was said on the subject; and when the

201. was advanced it was merely as an ordinary loan. I think there is no ground for any set off, and must advise the jury to find for the plaintiff.

Verdict for the plaintiff.

Curwood, and Wright, for the plaintiff. Jervis, for the defendant.

WORCESTER ASSIZES:

WRIGHT v. COURT, BOLTON, and CHAMBERS.

If three defendants have jointly imprisoned the plaintiff, the declaration of one of the defendants, made some weeks after, in the absence of the others, tending to show that the imprisonment arose from malice, is admissible in evidence, in an action for false imprisonment brought against all three.

False imprisonment. Plea—General issue; and several other pleas, which were demurred to.

The defendant, Court, was the constable of Tardebig, in the county of Worcester, and the other defendants were needle manufacturers at that place, who, having been robbed of a considerable quantity of needles, with the assistance of the other defendant, took the plaintiff into custody on the 3d day of November, 1824, and locked him up in the cage at Redditch, and there kept him till the 6th of November, without taking him before any magistrate. However, on the 6th, they took him before the Rev. Lord Aston, a magistrate, who remanded the plaintiff for two days longer, when he was discharged.

The plaintiff's counsel wished to give in evidence, that several weeks after all the defendants had locked the plaintiff up in the cage, the defendant, Court, said, "I will take care that neither of the Wrights shall have a bed to lie on before the end of six months." At the time this was said the other defendants

were not present.

*Jervia, for the defendants, objected, that this declaration of the defendant, Court, ought not to be received in evidence, because it was made in the absence of the other defendants. In this action the plaintiff proceeded for an alleged injury committed on him by the three defendants jointly; now, this at most was only a manifesting of individual malice in the defendant, Court, and not at all connected with the other defendants, or having any relation to the joint act done by all of them. He would submit, that there could not be a stronger case to show the hardship of receiving such evidence than the present. The damages, if any, would be joint against all the defendants; and those damages would be much increased if this expression of individual malice was received in evidence. Now, it was quite clear, that if a verdict passed for the plaintiff, as one of the defendants was only a constable and the others highly respectable manufacturers, the plaintiff would sue out his execution for the whole damages against the latter, although the amount of them was much swelled by this individual declaration of the former.

GARROW, B. I am of opinion that this declaration of the defendant, Court, is evidence. It is necessary, that the plaintiff should connect all the defend-

ants as joint trespassers in the fact of imprisonment; and having done so, I must receive in evidence any thing that either of the defendants said relative to the trespass, though in the absence of the others. So much as to the law. On the hardship of the case, I need only say, that if the law were not so, a man going to do another an injury might proclaim his malice in the market-place, and yet shut out evidence of such malice from the consideration of the jury, by only associating himself in the transaction with other persons a shade less guilty than himself; and persons may always avoid the declarations of the malice of their co-defendants operating against them, by taking care not to be concerned in the doing of things which they cannot afterwards justify.

*234] *The evidence was then received.

Verdict for the plaintiff.—Damages, 5%.

Curwood, and Carrington, for the plaintiff.

Jervis, Taunton, and Russel, for the defendants.

[Attornies—Gowland, and Robeson.]

REX v. BILLINGHAM, SAVAGE, and SKINNER.

All persons present countenancing a prize fight, are guilty of an offence.

When a prize fight is expected, the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they refuse to enter into securities, to commit them.

THE prisoners were indicted for a riot, and for assaulting Daniel Rogers,

Esquire, a magistrate, in the execution of his office.

It appeared, that Billingham and Savage had agreed to fight a pitched battle; and for that purpose they met at a place near Hagley, and about one thousand persons were assembled to witness the fight. Mr. Rogers was applied to to prevent it, and for that purpose went (with others) to the place, and told them that they should not fight. The defendant Skinner said, that they should, and a scuffle ensued between him and Mr. Rogers, who endeavored to apprehend him, which ended in a general tumult on the part of the mob, and the rescue of Skinner.

Burrough, J. By law, whatever is done in such an assembly by one, all present are equally liable for; which ought to make persons very careful. It cannot be disputed that all these fights are illegal, and no consent can make them legal, and all the country being present would not make them less an offence. They are unlawful assemblies, and every one going to them is guilty of an offence. The inconvenience in the country is not so great, but nearer London the quantity of crime that these fights lead to, is immense. My advice to magistrates and constables is, in cases where they have information of a fight, to secure the combatants beforehand, and take them to a magistrate, who ought to compel them to enter into securities to keep the peace till the next assizes or sessions; and if they will not enter into such security, to commit them to prison. In this way the mischief would be prevented, and the fights put a stop to.

Verdict-Guilty.

Russel, and Ryan, for the prosecution.

[Attornies—Hill, and ———]

STAFFORD ASSIZES.

REX v. THEODORE MOORE.

A collar of iron for graining the edges of counterfeit money, is an instrument within the stat. 8 & 9 W. 3, c. 26, s. 1, although it is to be used in a coining press. It is no objection to evidence on an indictment for felony, that it also goes to show the prisoner guilty of another felony.

THE prisoner was indicted under the stat. 8 & 9 W. 3, c. 26, s. 1, for having in his possession an edger, not in common use in any trade, but contrived for marking money round the edges. Other counts charged it to be "an edging tool," "an instrument," and an "engine" for the above purpose. The thing found in the prisoner's possession was a collar, which would make a grained edge (similar to that now put on half-crowns) on the edges of pieces of metal of that size. This collar was a ring of iron, on the inner edge of which the marks to be indented on the edge of the false coin were made; and it was to be placed on the lower die when in the coining press, and the pressure applied to the blank, by means of the dies, pressed out the blank in a lateral direction, so as to receive the marks on the edge from the inside of this ring of iron.

A witness from the mint proved, that this was the present method of putting the grained edges on half-crowns, but that it was a recent invention, and not known at the time of the passing of the act of W. 3. At that time the graining of the edges of coin was a separate process, and distinct from the process of coining, and was done by an instrument held in the hand, and called an edger

or edging tool; but that that instrument was not now in use.

Curwood, for the prisoner, objected, that it was clearly shown that this collar was neither an edger nor an edging tool, *and it was neither an engine [*236 nor an instrument, those terms importing things distinct from other machinery. As this collar was of no use except as forming a part of a coining press; it was, therefore, neither an engine nor an instrument, being in fact only a part of something else. The real state of the case was this: in the reign of King William, the only way of graining the edges of money, was by a hand tool; and the legislature, therefore, made it criminal to have such a thing. They could not provide against what was not invented; but it was legal to have a collar of this kind, because no legislative enactment forbade it; the thing not being invented at the time the act passed.

Jervis, for the prosecution, argued, that this collar was an instrument for graining the edges of pieces of metal, and was within the general words of the statute, though it might not be an edger or edging tool, and it was not the less an instrument, because it was used in a press, than if used by the hand; and the general words of the act would be of no use, if they did not apply to instru-

ments which were different from the old instrument called an edger.

BURROUGH, J., (having consulted with GARROW, B.,) reserved the point for the opinion of the twelve judges.

An accomplice was called, who proved that the prisoner had used this collar

for graining the edges of counterfeit half-crowns.

Curwood, for the prisoner, objected to this evidence. The act of coining being a species of treason higher in degree than the one the prisoner was charged with, the greater offence ought not to be given in evidence to prove the less.

BURROUGH, J. Whatever goes to prove the prisoner *guilty of the offence he is charged with, is evidence; however it may also go to show him guilty of another felony.

The evidence was received.

Verdict, Guilty.

Jervis, Taunton, and Shepherd, for the prosecution. Curvood, and C. Phillips, for the prisoner.

[Attornies-Chippendale, and Jones.]

The first point has been considered by the twelve judges, who were of opinion, that the collar was an instrument within the statute.

MONMOUTH ASSIZES.

JAMES v. SWIFT, Esq.

A notice of action to a magistrate, signed by a firm of two attornies who are partners, and are employed by the plaintiff, is good. And if it be signed T. & W. A. W., this is good, though the christian name of one is T. A., and of the other W. A., if there was no other firm of the same surname, in the place at which the notice bore date.

It is no objection that the notice is signed by a firm.

FALSE imprisonment against the defendant, who was bailiff, and one of the justices of the borough of *Monmouth*. It appeared, that the plaintiff's attorney was named *Thomas Addams Williams*.

Ludlow, for the defendant, objected, that the name of the plaintiff's attorney was not correctly stated in the signature to the notice of action: the notice of action being signed, "T. & W. A. Williams." Now, the attorney on the record was, "Thomas Addams Williams," and that was his true name, his brother's name being William Addams Williams, Thomas Addams being the christian name of the attorney in the record.

GARROW, B. This notice was intended to give your client an opportunity of tendering amends. If you can show, that in *Monmouth* (from which this notice is dated) there are two firms of *Williams*, who are attornies, there may be something in it; but without that the notice is good.

Ludlow then objected, that the notice was by two attornies, the action being

brought only by one.

*238] *GARROW, B. There is nothing in that.

Verdict for the plaintiff—Damages 51.

Campbell, and C. Phillips, for the plaintiff.

Ludlow, for the defendant.

[Attornies—T. & W. A. Williams, and Philpots.]

In the ensuing Michaelmas Term, Ludlow moved for a rule nisi for a new trial, but the Court concurred in the opinion of the learned Baron at the trial, and refused the rule.

HOWELL v. YOUNG, Gent., one, &c.

In an action on the case, against an attorney, for negligence, if the declaration state that the plaintiff retained him to see if a certain security were good, and that he accepted the retainer and neglected his duty, and represented the security to be good, and that the plaintiff advanced his money, and that the security was bad, by means of which the plaintiff lost the interest. The gist of the action is the negligence, and therefore the statute of limitations runs from the time of the negligence, and not from the time of the loss of the interest.

Acrion on the case. The 1st count of the declaration stated, that the plaintiff had agreed with one John Olive and one Ralph Olive to lend them the sum of 3000l., the repayment of which was to be secured by a warrant of attorney, to confess, &c.; and to be further secured by certain mortgages of freehold premises, &c., provided such warrant of attorney and mortgages should be found to be a good and sufficient security; and that the plaintiff retained the defendant for reasonable fees, &c., to ascertain whether the said warrant of attorney and mortgages would be a good, and valid, and sufficient security for the repayment, &c.; and that the defendant "having then and there accepted such retainer and employment, it became, and was his duty to use due and proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a good, valid, and sufficient security to secure," &c.: "nevertheless, the plaintiff in fact saith that the defendant, not regarding his duty in that behalf, but contriving to deceive and defraud the said plaintiff in this respect, did not, nor would use due or proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a good, valid, &c., security, but wholly neglected and omitted so to do, and, on the contrary thereof, on," &c., 24, &c., " falsely and deceitfully *represented and asserted, and caused and procured the said plaintiff to believe, that the said warrant of attorney and mortgages were a good," &c., "security," &c.: "whereupon, the plaintiff, confiding in the said representations and assertions of the said defendant," advanced the money. The declaration then proceeded to state, that J. & R. Olive gave a warrant of attorney, dated March 1st, 54 Geo. 3, and executed indentures of lease and release on the 9th and 10th of March, and an assignment on the 9th of March in the same year; and that these securities were not good or sufficient; by which the plaintiff was injured, and had lost the interest of the sum, and was likely to lose the principal. The 2d count was similar to the 1st, except that it did not state the warrant of attorney. The 3d count was similar, but stated it to be an advance of money on a security. The 4th count stated, that the plaintiff had agreed to lend 3000l. to J. & R. Olive, on security, and defendant was employed, &c., and falsely asserted, that the warrant of attorney was a sufficient security, well knowing that it was not.

Pleas—1st, The general issue; and, 2d, That the defendant was not guilty of the supposed grievances within six years; and, 3d, Actio non accrevit infrasex annos. Replication, that the cause of action did occur within six years; and a special demurrer to the second plea, on the authority of the case of Dys-

ter v. Battye, 3 B. & A. 448.

It appeared, that in the year 1814, the plaintiff had a sum of 30001., and that he went to the defendant, who was an attorney, to place it out for him on free-hold security; and the defendant said, he knew two gentlemen near Gloucester who would take it; and that he introduced the plaintiff to the Messrs. Olive, who were then in credit, and considered respectable persons. This money was advanced, and the warrant of attorney and mortgages given, as stated in the declaration. The Olives continued in credit, and kept the interest regularly paid till the month of October, 1820. (R. Olive having died previously.) John Olive became bankrupt in the month of December, *1820, and feed in that month. It was then discovered, that a very considerable

proportion of the lands pretended to be mortgaged by Messrs. Ofive to the plaintiff did not belong to them, but were the property of other persons; and that the part that did belong to them was not worth 3000l. or near that amount. The action was commenced in *Michaelmas* term, 1824.

Burrough, J., asked the plaintiff's counsel, how they got over the statute

of limitations?

Curwood, for the plaintiff, referred his Lordship to the cases of Roberts v. Read, 16 Ea. 215, and Gillon v. Boddington, ante, Vol. 1, p. 541, where it was held, that in an action on the case the statute ran from the time of the damage, which in this case did not accrue till the failure of the payment of the interest, and not from the time of the act done, and no damage had occurred for which the plaintiff could bring an action, till he was injured by the failure of the interest,

Burrough, J. The law is the other way, otherwise, no one would be safe;

and his Lordship cited Short v. M. Carthy, 3 B. & A. 626.

The plaintiff's counsel then wished to go on the fourth count, which alleged fraud in the defendant, and cited the case of *Bree* v. *Holbech*, Doug. 130, as an authority to show that, in cases of fraud, the statute of limitations only ran from the time of the discovery of the fraud.

BURROUGH, J. Without giving any opinion as to the time from which the statute runs where there is fraud, I shall permit the case to go to the jury. In

every other view of the case the statute is a bar.

The case then proceeded on the question of fraud, *and the jury found a verdict for the defendant, thereby negativing the fraud.

Curwood, Maule, C. Phillips, Phillipots, and Carrington, for the plaintiff. Taunton. Ludlow, Campbell, and Cross, for the defendant.

[Attornies—Croome & Smith, and Youngs & Duberly.]

In the ensuing term *Curwood* moved for a new trial, on the ground that, in actions on the case, the statute runs from the time of the damage, which in this case was the loss of interest in 1820, and not from the time of the act done or smitted, which was the cause of the loss; and the Court granted a rule *nisi*.

COURT OF KING'S BENCH.

BEFORE BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

(Sitting under the King's Warrant.)

THE Court called on Curwood, Maule, and Currington, to support the rule for a new trial. They argued that, to show from what time the statute ran, it was necessary to consider when the cause of action accrued, which was stated on the present record. It did not follow, that because the plaintiff had a cause of action more than six years ago, he was barred if the cause here stated accrued within six years. In many cases, a plaintiff may have different causes of action, and different forms of action on the same state of facts; notwithstand

ing the defendant may lose some advantage by the plaintiff changing his form of action. In some instances he may bring his action in case, or in assumpsil, as in that of a carrier for the loss of goods; and yet in the former, the defendant loses his plea in abatement for not joining all his partners. Assignees of a bankrupt may often bring trover instead of assumpsit, which ousts the defendant of a set off; and it is said in Scott v. Shepherd, 3 *Wils. 408; and laid down in Wheatly v. Stone, Hob. 180, that a plaintiff might, under some circumstances, bring either trespass or case:—that showed that he might waive the trespass, and resort to the consequential damage; so a party may bring assumpsit to recover money due instead of debt, although the defendant loses his wager of law. Slades's case, 4 Rep. 93 a. And as the plaintiff here had the personal security as well as the bond, he could bring no action till the loss of the interest, because, though the mortgage might be bad from the first, yet the personal security of the Olives might be sufficient. Hawkins v. Howard of Gibbs, ante, Vol. 1, p. 222: and a plaintiff cannot sue quia timet except in the six cases mentioned by Lord Coke, 1 Inst. 100 a.

BAYLEY, J. A man certainly cannot sue quia timet except in those cases, but if your client had got a bad security, he had a complete cause of action at

that time.

The plaintiff's counsel then argued on the cases of Roberts v. Read, and Gillon v. Boddington, that if the declaration was framed in case, the statute only ran from the damage, although if it had been in assumpsit, the statute would clearly have run from the breach of the promise. As in the cases of Battley v. Faulkner, 3 B. & A. 288, and Short v. M. Carthy, 3 B. & A. 626. The cause of action being in the one set of cases the damage; in the other, the breach of the promise.

BAYLEY, J. The cause of action stated in this declaration is, the alleged misconduct of the defendant. The declaration alleges a retainer to do certain work, and that it was the defendant's duty to see that certain securities were good; and then states a breach that the defendant neglected his duty, and misrepresented the goodness of the security, and that the plaintiff lent the money. It also states the security to be bad. This alone is a perfect count, and shows a clear cause of action, and would, on sufficient *evidence, have entitled the plaintiff to recover, because the defendant had accepted a retainer, and the plaintiff had got a bad security instead of a good one. The damage is only the natural consequence of the previous injury. If an action is brought for words in themselves actionable, and the declaration states, that "by means whereof," &c., the plaintiff sustained special damage, what is considered as the cause of action? Clearly the speaking of the words, and the latter part is only an explanation of the manner in which the previous injury had occasioned damage. In assumpsit, it is clear that if the breach of duty was beyond the six years, the statute of limitations is a bar, though the damage was within six years. In Short v. M. Carthy, an attorney was to make a search, and the statute was there held to run, not from the time of the promise, but from the time of the neglect to perform the duty. I cannot see any substantial difference between assumpsit for a breach of duty, and an action on the case; and it would be a great anomaly, if, where the law raises the duty and the promise, you would be barred in assumpsit; but if you framed your action in case, on the duty, you would not. Framed as this declaration is, the gist of the action is the negligence of the defendant, and not the damage; and therefore, I think, that the statute is a bar.

HOLROYD, J. I think the negligence is the cause of action, and that the statute is a bar, unless the loss of interest had raised a fresh cause of action; and I think it did not; it merely went to measure the damages. A distinction has been taken between actions on the case for tort, and actions of assumpsit; but the ground of action, the negligence, is the same in both the forms. The case of Fetter v. Beale, 1 Salk. 11, goes to show a distinction between this

case and those for excavating near walls. It was a case of assault; the party had recovered damages for the assault, and afterwards a piece of his skull came out, and he brought a fresh action. If the damage had *been the cause of action, he would have recovered for this fresh injury; but the Court held that he could not. But in the cases of the excavations, there was a continuing cause of action. Shower, who was for the plaintiff in the case in Salkeld, compared it to a nuisance, where every new dropping is a fresh cause of action; but Holl, C. J., said, that there was no new battery by the defendant, and that the consequence of the battery was not the cause of action; and in the present case there is not any new negligence. If an action had been brought before the non-payment of the interest, the jury might take into their consideration the probable loss the plaintiff might incur. And if such an action had been brought, the fresh damage by the failure of interest would not have made a fresh cause of action. If so, the plea is proved, and the whole cause of action accrued more than six years ago.

Rule discharged.

LITTLEDALE, J., had left the Court before Mr. Justice Holroyd had concluded his judgment.

On this point see, in addition to the cases above cited, Lowe v. Harwood, Palm. 529; Saunders v. Edwards, 1 Sid. 95; and Whitehead v. Howard, 2 B. & B. 372.

On the question, how far fraud takes a case out of the statute of limitations, see the cases of Bres v. Holbech, Doug. 630; South See Company v. Wymondsell, 3 P. Wms. 143; Lord Warrington's Case, 3 P. Wms. 144; Brown v. Howard, 2 B. & B. 73; and Clark v. Hongham, 3 Dow. & Ry. 322.

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, IN HILARY TERM, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

DOE, on the Demise of CHANDLESS, v. ROBSON.

To support an ejectment on a forfeiture of a lease by non-performance of a covenant, if the covenant be to do an act, the lessor of the plaintiff must give some evidence of the omission of the act. And if the covenant be for payment of rent, the lessor of the plaintiff must prove a demand of such rent.

EXECUTION to recover a house, in the parish of St. Mary-le-bone. The defendant was the under-lessee, and the ejectment was brought by the landlord on an alleged forfeiture incurred by breach of two of the covenants contained in the lease. One of them being a covenant to pay the rent, and the other a covenant to duly keep in repair the pavement of a certain footpath, according to the provisions of a private act of Parliament, relative to the pavements of the parish of St. Mary-le-bone.

The lease containing these covenants, and a proviso for re-entry for non-performance of any of the covenants therein contained, was put in, and it was shown that the defendant was the under-lessee, but no evidence was given on the part of the lessor of the plaintiff to show that any rent had ever been

demanded, or that the footpath was not in good repair.

*Abbott, C. J. I think the plaintiff must be called, for in all cases of forfeiture, the lessor of the plaintiff must give some negative evidence that the thing has not been done. If the covenant is to pay rent, it ought to be shown that the rent has been demanded; and if the covenant be (552)

for the doing of any act, some evidence of the omission should be given before a remedy so highly penal can be put in force.

Nonsuit

Denman, and Chitty, for the lessee of the plaintiff. Storks, for the defendant,

[Attornies-C. Wilkinson, and Hallet & H.]

SITTINGS AT WESTMINSTER, AFTER HILARY TERM.

DOE, on the Demise of KNIGHT, v. ROWE.

If on the trial of an ejectment against the assignee of a tenant on a forfeiture of a lease by breach of covenant, it appear that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he ought—The landlord cannot recover, although the covenants be actually broken, and there be neither release nor a dispeasation on the part of the landlord.

EJECTMENT to recover a house and premises at Kensington. The lessor of the plaintiff was the landlord, and the defendant had been appointed assignee of a person named John Leonard Jones, who was the lessee, he having taken the benefit of the Insolvent Debtors' act. The lesse, which was dated July 20, 1820, contained the usual clause of re-entry for breach of any of the covemants, and inter alia the following covenant: "And also, that he, the said John Leonard Jones, his executors, administrators, and assigns, or some or one of them, shall and will, at his and their own costs and charges, forthwith insure and cause to be insured upon the said messuages, tenements, and buildings, and upon all such other erections and buildings as shall or may, during the continuance of the said term hereby granted, be erected and built on the premises hereby *demised, or any part thereof, in two-thirds of the value thereof at the least, from loss or damage by fire, in the Sun Fire Insurance Office, for insurance from fire, or in some other respectable office, in the joint names of the said William Knight, his heirs and assigns, and the said John Leonard Jones, his executors, administrators, and assigns; and from time to time during the continuance of this demise, the said John Leonard, his executors, administrators, and assigns, shall and will renew, and keep in force such policy or policies of insurance, and also shall and will produce and show the policy or policies of such insurance, and the receipt of the premium and duty thereof from time to time when thereunto requested by the said William Knight, his heirs, or assigns." And it was further provided, that in case of Jones, or his executors, &c., omitting to insure as before covenanted, that the lessor should be at liberty to do so, and to take the premium as increased rent. On the part of the plaintiff, the execution of the lease was proved, and also,

On the part of the plaintiff, the execution of the lease was proved, and also, that the defendant was appointed assignee of the lessee under the Insolvent Debtors' Court in *March*, 1823; and it further appeared, that in the month of *October*, 1825, Mr. *Knight* called on the defendant, and asked to see the policy of insurance effected on those premises. It was shown him, and was for 8001., and in the defendant's name only. And it was proved on the part of the

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plaintiff, that the premises were worth from 1700l. to 1800l.; however, on this point there was a contradiction; the defendant's witnesses stated the value not to exceed 1200l.

The defence was, that the defendant had believed that he was doing what was right, but that he was deceived by the conduct of the lessor of the plaintif himself. And it appeared, that when Jones executed the original lease, both that and the counterpart remained with the lessor, he having a lien on them for money lent. But in the year 1822, Jones wishing to raise money upon the lease, Mr. *Knight, the lessor of the plaintiff, being an attorney, prepared an abstract, which was then shown to the defendant. In that abstract it was stated, that the tenant was "to insure and keep insured the premises, and to produce the policy and receipts; and if no insurance, or a refusal to produce the policy and receipts, Mr. Knight is to be at liberty to insure." At Christmas, 1823, a year's rent was due, and Jones having been discharged under the Insolvent Debtors' act, it appeared, that from Christmas, 1823, to Christmas, 1824, the lessor of the plaintiff had himself insured the premises at the Phanix Fire Office at 800l., and that at Christmas, 1824, the defendant insured them at that office at the same sum.

On these facts, Campbell, for the defendant, argued that the defendant had acted bona fide; that he was led to do what he had done by having seen as abstract furnished by the lessor of the plaintiff himself; and that as to the sum insured, that was the precise value at which the lessor of the plaintiff had himself insured the premises in the previous year.

Scarlett, contra, contended, that these facts were neither a release nor a dispensation with the covenant, and that as to the abstract, any one who was going to purchase the premises, or to lend money on them, would not do so

without a perusal of the original lease.

ABBOTT, C. J. The lessee and his assigns are, by this covenant, bound to effect an insurance on the premises at two-thirds of their value; and though there is clearly no dispensation in this case, I am of opinion, that if the conduct of the lessor of the plaintiff was such as to induce any cautious and reasonable man to suppose that he would be doing enough if he insured at 8001. in his own name, as this is a case of forfeiture, the lessor of the plaintiff would not be entitled to recover: and, in that way, I *shall leave the case to the jury. [*249 Mr. Rowe insured at the same sum at which the lessor of the plaintiff himself had insured, and he effected the policy at the same insurance office. It is said that the policy was in his own name only. Now, on that point it will be for the jury to say, whether, after seeing the abstract, the defendant did not, as a reasonably prudent man, think that he was doing all that was necessary; for if he did, although the abstract was not intended to deceive, the defendant is entitled to a verdict, this ejectment being brought for a forfeiture.

Verdict for the defendant.

Scarlett, and Holt, for the lessor of the plaintiff. Campbell, for the defendant.

[Attornies-Popkin, and Thomas.]

By the cases of Reynolds v. Pitt, 19 Ves. 134, and White v. Warner, 2 Mer. 459, it appears that equity will not grant an injunction against an ejectment for a breach of covenant to insure against fire. See also the case of Doe d. Pett v. Sherwin, 3 Camp. 134.

JARMAIN v. ALGAR.

A promise by a party to execute a bail-bond on a writ to be sued out against A. B., in consideration of the plaintiff forbearing to arrest A. B. on a writ already sued out, is not a promise to answer for the debt, &c., of another, under the 4th section of the statute of frauds.

An averment of a tender of the bail-bond for execution is not proved by evidence of the sheriff's officer going to the defendant, and asking him to sign the bail-bond, no bond being produced, he having none with him, and his assistant only having some blank bonds in his pocket, which he always carried.

The declaration stated, that at the time of, &c., one George Flack was indebted to the plaintiff in the sum of 34l. 4s. 8d., and that the plaintiff had caused a certain bailable writ called a latitat, indorsed for bail for that sum, to be issued out of the Court, &c., and was about to cause Flack to be arrested thereon; and that the defendant, in consideration that the plaintiff would forbear to arrest Flack, promised to execute a bail-bond upon process issued either into Sussex or Middlesex against Flack, when such bond should be tendered to him, within one week from the time *of making the promise. It then averred that the plaintiff did forbear to arrest Flack, and caused a bill of Middlesex to be issued against him, and that the sheriff of Middlesex, within the time limited, tendered a bail-bond, conditioned, &c., and requested the defendant to execute it; yet that defendant, not regarding, &c., refused to execute, whereby, &c. Plea—General issue.

It appeared, that very early in the month of August, 1825, a bailable writ was sued out against Mr. George Flack, and that Mr. Roe, the plaintiff's attorney, soon after went to Brighton, where he saw Mr. Flack and the desendant, when the latter, in consideration that Mr. Roe would not cause Flack to be arrested on that writ, entered into the following undertaking:

"JARMAIN against FLACK.

"Mr. James Roe,

"I hereby undertake to sign a bail-bond for the above defendant in this action, either on a writ issued into Sussex or into Middlesex, when tendered to me within one week from this date.

"August 8, 1825.

(Signed)

"Jos. Algar."

On the 13th of August Mr. Roe sued out a bill of Middlesex against Mr. Flack, the original defendant, indorsed for bail, to the amount of 34l. 4s. 8d.; and a warrant was delivered to Whitcombe, a sheriff's officer, who, on the same day, (Aug. 13th.) went to the defendant, and told him that he came by the desire of Mr. Roe to ask him to sign the bail-bond for Mr. Flack, and that the defendant declined to execute the bond till Mr. Flack's name was to it. It however appeared, that no bond was produced by the officer, nor had he any bail-bond in his possession at the time; but his assistant, who accompanied him, proved that he had some blank bail-bonds in his pocket, which he always carried.

*251] *Marryat, and Stephen, for the defendant.—In this case the plaintiff must be called. This undertaking is a promise to answer for the default of Flack, and is a promise within the fourth section of the statute of frauds.† It may be argued that this is not an undertaking to pay the money;

[†] By the 4th section of the stat. of frauds, 29 Car. 2, c. 3, it is ensetted, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the sgreement upon which such action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

but it being a promise to execute a bail-bond, the party impliedly undertakes to pay the debt, in one of the events which the bail-bond is to meet. If this be within the statute, though it is in writing, it will not be good, as it does not state the consideration, which is essential to a guarantee, under the case of Saunders v. Wakefield, 4 B. & A. 595. There is also another ground of non-suit, which is, that the plaintiff in his declaration alleges an actual tender of the bond for execution. Now, nothing like a tender of it is proved. Perhaps it may be answered, that the circumstances that occurred between Whitcombe and the defendant amounted to a dispensing with the tender. But if that were so, it should have been stated in that way. In cases of real property there are two modes of declaring; either to aver a tender of the conveyance, or a dispensation.—Here the plaintiff has alleged an actual tender, and failed in proving it.

ABBOTT, C. J. As at present advised, I think this undertaking is not within the statute of frauds, and is not a promise to answer for the debt, default, or

miscarriage of another, within the meaning of its provisions.

Gurney, for the plaintiff.—On the point made as to the *tender, I submit, that where it has appeared that a party has had his money ready, but he was told by the other party that it would not be received, that is a good tender, although the money was not produced; therefore in this case, if the facts amount to this, that the defendant by his conduct prevented the officer from tendering the bond, the plaintiff ought not to be prejudiced by it.

Abbott, C. J. To prevent the necessity of the record coming down again,

Mr. Marryat had better address the Jury as to the damages.

Marryat addressed the Jury, who found for the plaintiff.

Damages, 34l. 4s.

ABBOTT, C. J. I am of opinion that the plaintiff has failed in proving the tender of the bond, and that therefore he must be nonsuited.

The plaintiff was then nonsuited, Mr. Gurney having leave to move to enter

a verdict for the plaintiff for the sum of 341. 4s.t Gurney, and Talfourd, for the plaintiff.

Marryat, and Stephen, for the defendant.

[Attornies—Roe, and Collins.]

GOLDSTEIN v. FOSS et al.

A circular by the secretary of a society for the protection of trade against swindlers and sharpers, stating, that the plaintiff is considered an improper person to be proposed to be ballotted for as a member of that society, meaning thereby, that the plaintiff is a sharper and swindler, is a libel; and if the Jury are satisfied that that imputation is made, it is a libel, however cautiously the paper may be worded.

LIBEL. The first count of the declaration stated, that the plaintiff was always reputed, and, &c., to be of good *name and credit, and that he now, and for divers years had exercised and carried on, and still carries on the trade and business of a merchant, in co-partnership with Alexander Cohan Castle, and behaved himself honestly, &c., in his trade and business.

[†] No motion was ever made.

[‡] In cases of defamation, two persons cannot in general join in one action, for words

and was never guilty of acting in any wise dishonestly, and was acquiring great gains and profits; and that certain persons had been associated together under the name and description of "The Society for the protection of Trade against swindlers and sharpers;" and that the said defendant, E. J. Foss, "under color and pretence of being secretary of the said society, had from time to time published and was accustomed to publish certain printed reports, for the purpose of denoting and signifying to the members of the said society the names of such persons as were deemed and considered swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society, to wit, at, &c., yet the said defendant well knowing the premises, and greatly envying, &c., and contriving, &c., and thereby to injure the said plaintiff in his trade and business aforesaid, on, &c., at, &c., falsely and maliciously did compose, print, and publish, &c., of and concerning the plaintiff, the false, &c., libel, containing, among other things, the false, scandalous, defamatory, and libellous matter following, of and concerning the said plaintiff in the way of his said trade and business, that is to say, 10 Correspondence, 1825, Society of Guardians for the Protection of Trade against Swindlers *and Sharpers, Richard Clark, Esq., Chamberlain of London, Presi-^{*254}] <sup>*and Sharpers, Richara Ciark, Esq., Olemborish.
dent; George Bridges, Esq., Alderman, and M. P., Vice President;
Messrs. William Praced & Co., Bankers, Treasurers. I (meaning the said</sup> defendant E. J. F.) am directed to inform you, that the persons under-named, or using the firms of Goldstein, (meaning the said plaintiff,) Castles, & Co., 51 Mark Lane, and Benjamin Porter, Baker, Hackney Road, are reported to this society as improper to be proposed to be ballotted for as members thereof, (thereby then and there meaning that the said plaintiff was a swindler and sharper, and an improper person to be a member of the said society.")

The second count stated the libel to be of and concerning the plaintiff in his business as a merchant; and the concluding *innuendo* was, ("meaning thereby that the said plaintiff was an improper person to become a member of the said society, and was not a person fit to be entrusted in the way of his trade and

business as a merchant.")

The third count was similar, except that the concluding innuendo was ("thereby then and there meaning that the said plaintiff was an improper person to be a member of the said society, and had been and was guilty of dishonest and dishonorable conduct.")

The fourth count did not state the libel to be of the plaintiff in his business; and the concluding *innuendo* was ("thereby then and there meaning that the said plaintiff was not a person of honest and upright conduct.") Plea—General issue.

The libel was by putting the plaintiff's name and address in what is commonly called the swindling list. Mr. Foss, one of the defendants, was the secretary of a society called The Society for the Protection of Trade, and he sent the printed circular, stated in the declaration, to the members of that society, which was the libel complained of. The other defendant was the printer.

spoken of both of them. In the case of Smith v. Booker, Cro. Car. 512, it is laid down, that if one say to two, you jointly murdered J. S., each must bring a separate action; but in the case of Bods v. Batchelor, 3 Bos. & Pul. 150, it was held, that if words be spoken of parties in respect of their trade, and there be special damage to them in their trade, they may maintain a joint action, though the words were actionable on themselves. And Mr. Serjeant Williams gives it as his opinion (1 Wms. Saund. 117, a.) that two or more partners may join in an action for words, although they have sustained no special damage.

The defendant's counsel contended, that the terms of the libel not imputing

any offence, were not actionable without special damage.

ABBOTT, C. J. On this evidence, can any human being doubt what was meant to be imputed to the plaintiff? and no proof of special damage is necessary after such an imputation, however cautiously worded.

Verdict for the plaintiff.—Damages, 150l.

Scarlett, F. Pollock, Brougham, and Chitty, for the plaintiff. Gurney, Campbell, and Comyn, for the defendants.

[Attornies—E. Isaacs, and Foss.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, J&

In Banc.

Campbell now moved in arrest of judgment, on the ground, that as the action was for publishing alleged libellous matter, which did not, on the face of it, import the meaning applied to it to make it actionable, the declaration was bad; because it did not contain any colloquium, nor any introductory averment that the alleged libel was written of and concerning the extrinsic matter, which made it of libellous import; and that the innuendo could not supply the omission: and he cited Holt v. Scholefield, 6 T. R. 691, and Hawkes v. Hawkes, 8 East, 427.†

The Court granted a rule to show cause.

† The case of Holt v. Scholefield, was an action for slander. The declaration stated, that the plaintiff was of good fame, and never suspected of perjury; and that the defeadant maliciously intending to injure him, and subject him to the punishment provided for the crime of perjury, spoke, &c. "of and concerning the plaintiff;" Tim Holt (meaning the plaintiff) has foreworn himself, (meaning that the plaintiff had committed wilful and corrupt perjury.) It was objected, in arrest of judgment, that the word forsworn did not necessarily imply a false swearing in a judicial proceeding, and that the meaning could not be varied by the innuendo, unless with reference to some colloquium, (which was not here,) from which it might appear that the words were spoken concerning some judicial proceeding in which the plaintiff had given testimony. Lord Kenyon said, that "either the words themselves must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part, that they have that meaning:" and the judgment was arrested. In that case, the previous authorities on this subject will be found collected.

In the case of Hawkes v. Hawkes, which was also a case of verbal slander, the declaration stated, that the plaintiff had duly put in his answer on oath to a bill in the Excherger, and that the defendant said of and concerning the plaintiff, that he was forsworn, (meaning that the plaintiff had perjured himself in his said answer to the bill so filed against him as aforesaid.) It was here objected, that there was no collequism or introductory averment that the words were spoken of the plaintiff with reference to any judicial proceeding. This was held to be bad, and Lord Ellenborough said, "that the clear rule was, that, not only where the words spoken do not in themselves naturally convey the meaning imputed by the innuendo, but also, where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated that such matter existed, but also, that the words were spoken of and concerning that matter. As Lord C. J. De Grey says in the case of The King v. Horne, (2 Cowp. 884.) speaking of Barham's case, (4 Rep. 20 a.) where the slander was, 'he has burnt my barn,' the plaintiff cannot say by way of innuendo, 'my barn full of corn,' because that is not an explanation of the words, but an addition to them. But, if in the introduction it had been averred, that the defendant had a barn full of corn, and that in a discourse about that barn the defendant had spoken the words, an innuendo that he meant by these words the barn full of corn, would have been good."

*COURT OF COMMON PLEAS.

SITTINGS IN LONDON, AFTER HILARY TERM, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

WILLIAMS, Gent., One, &c., v. GOODWIN, the Elder.

If an attorney, having given credit to a person for the costs of a suit, put forward such person as a witness, and have him examined on the trial of the cause, without a release, (so objection being taken,) he cannot afterwards maintain an action against him for the recovery of such costs. If an attorney's clerk give a receipt for money on account to a different person from that to whom he gives credit, to enable such person to deceive others, such act of the clerk will not affect the master's right to recover the remainder against such person, though, if the attorney had done it himself, it would be good ground of nonsuit.

Assumest for an attorney's bill.—The charges were for bringing an action against a person named Stansfeld, of the Alderney Dairy Company, on behalf of Goodwin the younger, for a malicious prosecution; and the question of fact in the cause was, Whether the employment of the plaintiff to conduct that action was by the younger Goodwin, or his father, the defendant.

From the evidence of the plaintiff's managing clerk, it appeared that the present defendant, Goodwin, senior, had given the instructions for the former suit, and, after plea pleaded, was told by the witness that 20l. would be wanted towards the expenses of the cause. He came afterwards with the money, and brought his son with him. On the money being paid, the attorney's clerk was about to give a receipt in the name of Goodwin, senior, when he said, "It will make no difference if you give it in my son's name, for if the cause is lost, we shall get the cow-keepers to subscribe, if they think it is my son's action, but they will not subscribe if they think I have any thing to do with it." The receipt was accordingly given in the son's name. The son was at the time in insolvent circumstances. On the cross-examination of this witness, he admitted that Goodwin, senior, had been called and examined in his son's cause (no question being asked as to his interest) without having been released; but it appeared that a release was in Court, ready to be filled up if any objection had been taken.

Spankie, Serjt., for the defendant. There has been *a great deal of irregularity in the conduct of this plaintiff. His calling old Goodwin as a witness was a fraud upon the Judge and Jury. Will public policy permit an attorney to act in such a manner? Will it allow him to recover from a person whom he presents in Court as an impartial and disinterested witness? He has put forward the person in the character of a party not liable to him, and he is bound and concluded by that act.

BEST, C. J., observed, If the attorney himself had given the receipt mentioned, I should have nonsuited him upon it immediately; but I doubt whether he is answerable for the act done by his clerk. My opinion, however, upon the whole of the facts is, that an attorney, under such circumstances as are disclosed in this case, is not in a situation to maintain an action. I will put it to the jury to say, whether, in point of fact, the credit was given to the elder

Goodwin; but if they find that it was, I will notwithstanding nonsuit the plaintiff, and give him leave to move to enter a verdict.

The Jury found that the credit was given to the elder Goodwin alone.

Nonsuit, with leave to move.

Vaughan, Serjt., and Andrews, for the plaintiff. Spankie, Serjt., and Thesiger, for the defendant.

[Attornies—T. N. Williams, and Dollman.]

On the 3d day of the ensuing Term, Vaughan, Serjt., moved to set aside the nonsuit, pursuant to the leave given. If the attorney has misconducted himself, he is liable to be punished. The putting an incompetent witness into the box is of every day's occurrence, and it is for the opposite counsel to take an objection to his testimony. The question here is upon a contract.

*Park, J. I think it would be holding out a dangerous precedent to grant a rule to show cause in this case. The sources of justice should be kept pure. I think my Lord Chief Justice was right in directing a nonsuit at the trial. I think the impression upon which he acted, was an honorable, honest, and legal impression. And what do we do, by refusing a rule, but put this plaintiff in the same situation as he would have been in if he had released the defendant—which he must have done if the objection had been taken? For these reasons, I am of opinion, that a rule ought not to be granted.

The rest of the Court agreed.

Rule refused.

SITTINGS AT WESTMINSTER, AFTER HILARY TERM, 1826.

GILES, Assignee of HILLS, a Bankrupt, v. POWELL.

After the plaintiff has closed his case, the learned Judge will in general allow him to adduce fresh evidence to obviate objections which are beside the justice of the case, but not to get rid of any difficulty on the merits.

In actions by the assigness of bankrupts, if the commission issued between the 2d of Mey and the 1st of September, 1825, the formal proofs in support of the commission must be made out by parol evidence of the trading, act of bankruptcy, &c., whether notice of disputing them has been given or not.

disputing them has been given or not.

Semble—That evidence of the mere facts of a bankrupt having drawn or indersed a bill for 1001., and of that bill being over-due in the hands of a holder, is not sufficient proof of a petitioning creditor's debt, without proof of a default in the acceptor.

Assumpsrr for work and labor done by the bankrupt before his bankruptsy. The commission was put in. It was dated on the 21st of May, 1825; there was no notice of disputing the petitioning creditor's debt, &c.

BEST, C. J., (after referring to the stat. 6 Geo. 4, c. 16.)—The statute 5 Geo. 4, c. 98, is instantly repealed on the passing of this act, which received the royal assent on the 2d of May, 1825, except as to what relates to *certificates. Now, the new act is not to take effect till the 1st of September, 1825. This commission is between those two dates; and the repeal of the stat. 5 Geo. 4 being immediate, and the provisions of the stat. 6 Geo. 4 not taking effect till a later period, you cannot avail yourself of the modes of proving

the petitioning creditor's debt, &c., which are pointed out by either of those statutes.

The plaintiff's counsel proceeded to give parol evidence of the trading and

act of bankruptcy.

The petitioning creditor's debt was on two bills of exchange, to the amount of 124l., of which the petitioning creditor was the holder, the bankrupt being the indorser of both, and the drawer of one of them. The handwriting of the bankrupt to both was proved. One of the bills was dated February 4th, 1825, and was for 74l., payable three months after date: the other was dated December 24th, 1824, for 50l., at two months. The work done, for which the action was brought, was not disputed.

The plaintiff's counsel having closed their case,

Vaughan, Serjt., objected, that as the bankrupt was the drawer of one of these bills, and the indorser of the other, the proof of his handwriting, and the fact of their being over-due, would not show a good petitioning creditor's debt without proof that the acceptor had made default.

BEST, C. J. If the acceptor makes default, the drawer becomes liable; but unless I am shown some authority to warrant it, I shall not hold that the drawer

or indorser is liable without a default of the acceptor being proved.

The plaintiff's counsel wished to call a witness to prove that the bills had been dishonored, and that due notice of dishonor had been given to the bankrupt.

*Vaughan, Serjt. I hope your Lordship will not allow them to add this fresh evidence, after they have closed their case.

BEST, C. J. I shall always allow a party to adduce fresh evidence on points of this kind. I had a conversation with my Lord Chief Justice Abbott on the subject; and his Lordship stated, that he would never allow a witness to be called back to get rid of any difficulty on the merits, or on any thing which went to the justice of the case; but that he always allowed it to be done to get rid of objections which were beside the justice of the case, and little more than matter of form. I shall, therefore, allow the witness to be examined.

The witness proved the dishonor of the bills, and the notice to the bankrupt.

Verdict for the plaintiff.

Taddy, Serjt., and Storks, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies—Hallet & H., and Carlon.]

ADJOURNED SITTINGS IN LONDON, AFTER HILARY TERM, 1826.

BECKWITH v. CORRALL et al.

If a party possess himself of a stolen bill or note improperly, a demand and a refusal are not necessary previous to an action of trover brought for its recovery by the loser.

If a party be robbed of a negotiable security eight days before it is payable, and he does not give notice of his lose till the end of seven days, and then only to the payer, but gives no notice of any kind to the public, he does not use due diligence, and cannot recover in trover against a party who discounted such security six days after the loss.

And in such a case, the questions proper for the jury are, first, whether the plaintiff has used due diligence; and then, whether the defendant has acted with due caution,—unless there should be reason to suspect that the defendant knew, when he discounted the security, that it had been obtained by means of a felony; in which case, the conduct of the plaintiff may be left out of the question.

Trover for a bill of exchange for 331. 2s., drawn by Hammond & Co., bankers at Canterbury, on, and *accepted by Remington & Co., bankers in London, payable to the order of H. Meredith, and indorsed

by him.

On the 23d of December, 1825, the plaintiff was at an election at St. Dunstan's Church. He left between seven and eight in the evening, having his pocket-book with the bill in question in it, and retired to the Sussex Hotel, where, on feeling for his pocket-book to answer a question put to him, he found that his pocket had been cut, and the book taken away. A letter was the next day written to Mr. Meredith, at Liverpool, for the particulars of the bill, and his answer was received on the 26th. On the 27th, the following advertisement was inserted by the plaintiff in the Morning Advertiser:

"Lost, on Tuesday last, near St. Dunstan's Church, Fleet street, a pocket-book [describing it.] Whoever will bring it to [mentioning some public-house in Holborn,] shall receive two guineas reward. No further reward will be offered, as the contents are not worth a shilling to any one but the owner."

On Friday the 30th, notice of what had happened was given to Remington & Co., the acceptors. The bill became due on Saturday the 31st; and about six o'clock on the evening of that day, it was ascertained that it had been paid. On Sunday the 1st of January, 1826, the plaintiff's son went down to the banking-house of the defendants at Maidstone, and saw their principal clerk, who stated that he had taken the note in question on Thursday the 29th of December, of two young men, one of whom represented to him that the indorsement by Meredith was in the handwriting of his father: that he (the clerk) knew there was no such person as Meredith residing at Maidstone: that he supposed the young men to be persons passing through, and that he could not swear to them if he were to see them. It appeared that the pocket-book, without the bill, was thrown down the area of the plaintiff's house on Monday the 2d of January, accompanied by a letter written in the name of [*263] "Catchall."

It was admitted that the defendants had given value for the bill.

Taddy, Serjt., for the defendants, upon this state of facts contended that there was no conversion to maintain the action of trover. There should have been a demand made of the bill.

BEST, C. J. There is no necessity for a demand, if the party possessing

himself of the bill did so improperly.

Taddy, Serjt. The plaintiff should have sent immediately to Remington's, instead of which he suffers seven days to elapse without giving any nouce. We did not keep the bill. If any of the parties had failed, we should have been liable to the plaintiff; we acted in the proper course.

BEST, C. J. If you have not used due caution, you ought not to have

touched the bill; the very touching it is a conversion.

Taddy, Serjt., then went to the Jury. He contended, that the plaintiff was not entitled to recover, as he had not conducted himself with all proper dil-The advertisement is no notice to the public of the loss of any bill. Notice also should have been given to the drawers. The defendants, being country bankers at Maidstone, must have been acquainted with the handwriting of the drawers, who were bankers at Canterbury, in the same county. Is not a banker justified in discounting a bill drawn by a neighboring banker? Is he, without any advertisement, or any circumstance of suspicion appearing, to ask questions, and suspect that the party presenting it has obtained it through a felony? The plaintiff might have prevented *the mischief which happened, if he had given timely notice, either generally, or at Remington & Co.'s. Remington & Co. would have given notice to the drawers, and the drawers would have given notice to the discounters. Though the case of Lawson v. Weston, 4 Esp. N. P. C. 56, has been overruled, yet the general principles of that case are good, and apply themselves to this. The late case of Snow v. Peacock, ante, p. 215, went mainly on the magnitude of the note, it being for 500l.; but in this case the amount is only 33l.

BEST, C. J. The circumstances of this case are very different from those of Snow v. Peacock. The question is, has the plaintiff done all that he ought to do in order to apprise the public of the loss of the bill? If he has not, I am of opinion, that he cannot recover. The bill was lost on the 23d of December. Ought not the plaintiff to have given notice immediately? In the case of Snow v. Peacock, hand-bills were circulated, and advertisements inserted in "The Hue and Cry." But in this case nothing of the kind was done. No notice at all was given till the day before the bill became payable, and then only to the payers. There was no notice at all to the public. His Lordship left the case to the Jury, who found a

Verdict for the defendants.

Wilde, Serjt., and S. M. Phillipps, for the plaintiff. Taddy, Serjt., and Comyn, for the defendants.

[Attornies—Henson & D., and Egan & Waterman.]

On the 1st day of the following Term, Wilde, Serjt., moved for a new trial, on the ground, that it should not have been left to the Jury to say, 1st. Whether the *plaintiff had acted with due caution, and if he had, then, whether the defendants had done so; but that it should have been left to them to say, at all events, whether or no the defendants were bona fide holders.

PARK, and BURROUGH, Js., thought that the question had been rightly left to the Jury.

GAZELEE, J. There may be a case in which, notwithstanding the plaintiff has not done his duty, yet the defendants may have so conducted themselves as to make themselves liable; but, in this case, I do not find such circumstances.

BEST, C. J. I quite agree with my Brother GAZELLE; and if there had been the slightest reason to think that the defendants in this case had any knowledge of the bills having been stolen, or if I had been asked by either party to put that question to the Jury, I should have given the go by to the other question of—whether or no the plaintiff had used due diligence? But there is no pretence for any such idea. And I think, that in those cases where a negotiable security is lost, it is the duty of the loser to give notice to the public, or else a person may very innocently receive it, and give value fairly for it.

Rule refused.

*COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

FAIRMAN D. GRIMBLE.

The servant of the defendant, a coach spring maker, received a spring of the plaintiff's to repair, and promised to bring it back by a certain hour. The defendant, after that, refused to return it without being first paid for the repair:—Held, not a sufficient conversion to support trover. The action, if any will lie, should be special assumptif.

TROVER for a carriage spring. Plea-General issue.

The defendant was a coach spring maker, and it was proved that his servant took a broken spring off a single horse break of the plaintiff, and said he would mend and replace it by 12 o'clock on the same day. He did not bring it back; and on the defendant being applied to for the spring, he said he would not put it on till he was paid for the repair. The plaintiff said he would pay him as soon as he had replaced the spring; but the defendant insisted on being paid first.

ABBOTT, C. J. This is nothing like a conversion by the defendant to his own use. If an action will lie at all, it must be for the breach of a special contract.

Nonsuit.

Abraham, for the plaintiff. Scarlett, for the defendant.

[Attornies—Clarke, and Gresham.]

*ADJOURNED SITTINGS IN LONDON AFTER EASTER [*267 TERM, 1826.

COOPER v. AMOS.

If the declaration is on a bill of exchange, and for goods sold, and a particular of demand is obtained under a Judge's order, the plaintiff may recover on the bill, though it is not mentioned in his particular of demand.

Assumpsir. The first count of the declaration was on a bill of exchange for 40l., of which the defendant was the indorser. The second count was on a bill of exchange for 20l., of which the defendant was also the indorser. There

was also a count for goods sold, and the other money counts. Plea—General issue.

The plaintiff made out a case on the two bills, and also for goods sold.

R. S. Richards, for the defendant, stated that the plaintiff's attorney had delivered a particular of his demand under a Judge's order, in which the demand for the goods and the bill stated in the second count were specified; but that in the particular, the bill for 40l. was not mentioned; he therefore convended, that as that bill was not mentioned in the particular of demand, the plaintiff could not recover on it.

ABBOTT, C. J. That is no objection; if the bill is stated in the declaration, it need not be mentioned in the particular. You must give a particular of goods sold, but you never need give a particular of bills of exchange, if they appear

in the declaration.

Verdict for the plaintiff.—Damages 1421.

Campbell, for the plaintiff. R. S. Richards, for the defendant.

[Attornies-Osbaldeston & M., and H. Hughes.]

For the other authorities on the subject of particulars of demand, see Arch. Pract. B. 221.

*208] *COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER, IN EASTER TERM, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

WALLS v. ATCHESON.

If a person let apartments for a year to a tenant, who occupies them part of the year, for which he pays, and then quits; and the party letting suffer another to occupy on an agreement also for a year, so that the first tenant could not, if he had wished, have obtained possession, such second letting is a rescinding of the first contract, so as to prevent any rent being recovered under it.

Use and occupation. The defendant took lodgings in the plaintiff's house, from 14th September, 1824, for a twelvementh certain, at sixty-five guineas a year; he occupied during the whole of the first and part of the second quarter. The rent for the first quarter had been paid, and it was to recover rent for the remainder of the twelvementh, that the action was brought. It appeared that, about three weeks after the defendant ceased to occupy, the plaintiff let the lodgings to a General Harley, who occupied for three months, went on the Continent for three months, and then came again into occupation, and had continued to occupy up to the time of the trial.

Cross, Serjt., for the defendant, contended that the plaintiff had no right to recover. It is absurd to say, according to the terms of the declaration, that

the defendant "occupied by the permission of the plaintiff," when in fact

another person was occupying by her permission on another contract.

Vaughan, Serjt. I submit that this case comes clearly within the principle laid down by Lord Kenyon, in Redpath v. Roberts, 3 Esp. 225. If the plaintiff has used the premises improperly, then let the defendant bring an action *against her. There is nothing that manifests an intention on the part of the plaintiff to release the defendant.

Chitty, on the same side.—This case is analogous to the second sale of goods, which the first purchaser refuses to accept. There, the difference is allowed to be recovered; and so it ought to be here: it is to prevent a wall

loss.

BEST, C. J. The question is, whether the act of the plaintiff is not a rescinding of the contract. I am of opinion that it is. I can see no fact to leave to the Jury. There is no doubt that the letting was for a twelvemonth, and if nothing had taken place, the defendant must have paid for the whole time. Mr. Chitty has compared this case to the case of a sale of goods which a party has refused to accept; but there, it is usual to give a notice, requiring that the goods may be taken away; and then if they are not taken away, that is a circumstance from which a Jury may presume an assent to a second sale on the part of the person to whom the notice was given. But in this case, there is no notice to the defendant. If the plaintiff put in General Harley, and could not turn him out, the defendant could not have the benefit of his contract, and therefore is not liable to pay.

Vaughan, Serjt., then proposed to read a notice which he had intended to have given in evidence, but which, from some circumstance or other, had been

overlooked.

Cross, Serjt., objected to the plaintiff's mending his case after an argument Best, C. J. I would not allow the addition of any parol evidence by a winess. I have communicated with the Chief Justice of the K. B. upon this subject; and we have agreed that it is better not to lay down any particular rule, but to leave it to the discretion of the Judge who tries a *cause, [*270 under the particular circumstances, to admit or not to admit what may be material.† In this case, I think I ought to admit this paper, because it cannot have been got up and manufactured for the purposes of the cause since the commencement of the trial.

The notice was then read. It only applied to the period of time subsequent to the three months during which General Harley had occupied under the

second contract.

BEST, C. J., was of opinion, that the reading of such a notice did not put the plaintiff in a better situation than he was in before; and adhering to his previous opinion, directed him to be

Nonsuited.

Vaughan, Serjt., and Chitty, for the plaintiff. Cross, Serjt., for the defendant.

[Attornies—R. Hill, and Lever.]

In the course of the Term, Vaughan, Serjt., moved for a new trial. He again cited the case of Redpath v. Roberts.

BEST, C. J. There is a distinction between that case and the present; for in that case, there was only an erdeavor to let, which was not successful; and

till any other person got actually into possession, the original tenant might have resumed his occupation, and received the benefit of his contract.

Vaughan, Serjt., then cited the case of Mollett v. Brayne, 2 Camp. 103. *PARK, J. I think the Chief Justice was right in nonsuiting the plaintiff, and that there is no color for this application. I should like to have the case of Mollett v. Brayne reconsidered.

Burrough, J. If there was a continued holding by the defendant, to let any other into possession was a tortious act, which, in my opinion, amounts to an eviction, and must be considered as determining the tenancy.

GASELEE, J. I think the plaintiff should have given notice of her intention to let the premises.

Rule refused.

BEFORE BEST, C. J., AND PARK, BURROUGH, AND GASELEE, JS.

At Bar.

RICHARD TOOTH, Demandant; JOHN BAGWELL, Tenant.

On the trial of a writ of right, though the demi-mark has been tendered, the tenant must begin.

The demi-mark may be tendered either at the joining of the mise or at the swearing of the grand assize; and if it has been done at the joining of the mise, it is too late, at the time of trial, for the demandant to take the objection. An examined copy of an answer in Chancery, by a person not party to the action, is evidence; and it is not necessary to produce the original, or prove the handwriting of the party.

Warr of right.†—The Usher of the Court made proclamation. Mr. Secondary Griffiths then called the Jury .- Sixteen appeared, five of whom were Knights, and the remainder, Esquires.—He then administered the oath to each juror separately as follows:--

- do swear that I will say the truth whether John Bagwell hath more near right to hold the tenements, which Richard Tooth demands against *272] him by his writ of right, or the said Richard Tooth to have *them as he demandeth, and for nothing to let, but to say the truth—So help me God."

Wilde, Serjt., for the tenant, then opened the pleadings.

Vaughan, Serjt., who was also for the tenant, then submitted, that as the demi-mark had been tendered, the demandant should be required, in the first instance, to show the seisin of his ancestor.

Burrough, J., mentioned a case of Luke v. Harris, 2 Bl. 1261, 1293, in which the demi-mark had been tendered, and yet the Court held that the tenant ought to begin.

Vuughan, Serjt. The object of tendering the demi-mark is to raise the

question.

GASELEE, J. There was a case of Dalton v. Harvey, tried in Dorsetshire, in which the practice mentioned by my brother Burrough was acted on. I thought at first that it was contrary to common sense, but on looking into the facts. I found that it was not so; for it became a question, whether the seisin was not a mere permission of the other party; and if that course had not been

adopted, the case must have been gone into twice. It was said in the case I allude to, that it had been ruled in *Luke* v. *Harris*, that the tenant ought to begin.

BEST, C. J. It having been once decided, I shall act upon that decision.

One decision is enough upon such a point as this.

Vaughan, Serjt., mentioned the cases of Hardman v. Clegg, 1 Holt N. P. C. 657, and Throgmorton v. Broker, Booth, 98.

*BEST, C. J. Luke v. Harris does not appear to have been referred to there.

The Court then decided that the tenant should begin.

Vaughan, Serjt., then addressed the grand assize, and established a case of

possession for some years, on the part of the tenant.

Bosanquet, Serjt., for the demandant.—There is a question in this case, whether the demi-mark has been tendered at the proper time. The utmost effect to be produced by it is, to call upon the demandant to show that Tooth, under whom he claims, was seised in the course of the reign of the late King George III. It is said by one of the Judges that the demi-mark is of no consequence, as the demandant must prove seisin without it. But this is contrary to the practice. The statute of the 32 H. VIII. c. 62, s. 6, says, that if any person sue, &c., for any manors, lands, &c., and cannot prove that they or their ancestors were in actual possession or seisin within the time limited by that act, if the same be traversed or denied, it shall be a bar. The statute is not pleaded, there is no traverse of the seisin here; if it had been, it would have been tried, as a collateral issue, by twelve jurors in the common way. It is said in Booth on Real Actions, pp. 98, 99, that the time of tendering the demi-mark is at the period of swearing the grand assize, which in this case has not been done. There never was an instance in which the demandant was called on to prove seisin, when the demi-mark had not been tendered at the time of the trial. Andrews v. Cromwell, Moore, 762, referred to by Serjeant Hill, in his notes on Booth.

BEST, C. J. Does not that mean that the demi-mark may be tendered at the joining of the mise, but that, if *it is omitted then, it will be in time [*e274]

if it be done at the swearing of the grand assize?

GASELEE, J., was of opinion that the demandant should have urged the objection at the time, instead of joining in the mise. His Lordship stated, that, in the *Dorchester* case, the demi-mark was tendered at the joining of the mise, and not at the time of the trial.

BURROUGH, J., concurred in the opinion that it was too late to make the

objection.

The Court then disallowed it, and the demandant went into his case.

In the course of the proof it became necessary to read certain extracts from an answer in a suit in Chancery, of Sir John St. Aubyn, Bart., and an examined copy was proposed to be put in evidence.

Wilde, Serjt., objected that as Sir John St. Aubyn was not a party to the action, the original answer must be produced, and his handwriting proved.

Taddy, Serjt., mentioned a case of The Counters of Dartmouth v. Roberts, 16 East, 336.

BEST, C. J. Where a man is a party to the suit, there the identity is known; but in this case the handwriting of the party should be seen; it may be material as to the question of identity.

Taddy, Serjt., then cited the case of Hennell v. Lyon, 1 B. & A. 182.

GASELEE, J., mentioned a case tried on the Western Circuit, in which a person from the Court of Chancery proved that that Court would not suffer the original answer to be taken to *Nisi Prius*, unless in a case of perjury.

*The Court after some further discussion yielded to the authority of Hennell v. Lyon, and received the copy in evidence, without proof of

the handwriting of the party to the original answer.

The demandant then went on with his case, but being unable to deduce his title in a regular order, the tenant succeeded.

Bosanquet, and Taddy, Serjts., for the demandant. Vaughan, and Wilde, Serjts., for the tenant.

[Attornies—Hallett & H., and Lane.]

SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1826.

MERLE et al., Assignees of BROOKS, v. MOORE.

In an action by the assignees of a bankrupt, communications made by the bankrupt to his attorney may be given in evidence, to prove the act of bankruptcy, if the bankrupt consents; and it does not lie in the mouth of the defendant to take the objection to their disclosure.

Assumestr for goods sold. A deed, dated the 30th February, 1822, between Brooks and the defendant, assigning all Brooks' property to the defendant, in fraud of his creditors, was put in as evidence of an act of bankruptcy by Brooks. And his former attorney was called, and asked as to the circumstances in which his client was at the time the deed was executed. His knowledge of those circumstances appeared to have been derived from communications made to him by Brooks, in his character of an attorney.

Vaughan, and Lawes, Serjts., submitted that these were confidential com-

munications, and could not be inquired into.

Wilde, Serjt. The objection does not lie in the mouth of the defendant.

*Viughan, Serjt. The law raises the confidence, and the attorney is estopped from making the disclosure.

BEST, C. J. It is not in your mouth to make the objection. It is for the

bankrupt to object, and if he does not, I shall receive the evidence.

Vaughan, Serjt. This is incidentally making the bankrupt a witness to support his commission; it is Brooks speaking through the mouth of his attorney.

BEST, C. J. It only removes an objection, it does not give effect to what is

not evidence.

Verdict for the plaintiffs.

Wilde, Serjt., and F. Pollock, for the plaintiffs. Vaughan, and Lawes, Serjts., for the defendant.

[Attornies-Mayhew, and Crofts.]

SITTINGS IN LONDON, AFTER EASTER TERM, 1826.

SMITH v. COOK et al.

If the miller to a vendor of corn receive an order from such vendor to deliver a quantity of flour to the vendee, and actually deliver a part under several sub-orders from the agent of the vendee, and afterwards refuse to deliver the remainder, on the ground of his having no more of the vendor's flour in his possession, the vendee may maintain trover against him, and will not be put to bring a special action of assumpsit on an implied promise to deliver the whole.

TROVER for thirty-nine sacks of flour. On the 25th November, 1825, the plaintiff bought two hundred sacks of flour, of Messrs. Harvey & Hill, who gave a delivery order, addressed to the defendants, who were millers, and had large premises attached to their mill, in which flour was deposited, requiring them to deliver two hundred sacks to the plaintiff. This order was served upon the defendant's foreman, who, when he received it, said, "very well."

*It appeared, that one hundred and sixty-one sacks had been delivered on orders, signed by a Mr. Bull, who was the agent of the plaintiff; but when the order for delivery of the remainder was presented, it was not attended to, in consequence, as was said by the defendants, of their not having

any more flour of Harvey & Hill's in their possession.

Adams, Serjt., for the defendants, submitted that the plaintiff should be non-suited. He has mistaken his form of action. Suppose the order received by the defendants is binding on them, and raises a promise to deliver the whole two hundred, whether they were in their possession or not, yet the form of action must be assumpsit for non-performance of the promise, and not trover, which cannot be maintained without possession of the article. There is no evidence of the defendants having more flour than they delivered.

BEST, C. J. I think there is evidence to go to the Jury, for them to say whether there were not at one time two hundred sacks of flour belonging to the plaintiff in the hands of the defendants, which they thought proper to undertake to deliver; and I am of opinion, that the plaintiff, under these circum-

stances, is not obliged to bring a special action of assumpsit.

Adams, Serjt., then addressed the Jury. The defendants are not wharfingers, nor warehousemen, but millers only, who receive corn to be ground. The order was accepted by the defendants, on the idea that there would be enough in their possession to execute it. They have done their duty as millers, and ought not to be concluded by the mere circumstance of receiving the

order given for the delivery of the whole number.

Best, C. J. In my opinion there is no defence to this action. You must certainly be satisfied that two hundred sacks of flour were in the custody of the defendants, as *millers to Harvey & Hill. And I think there is abundant evidence of that. The moment they deliver any part under the sub-orders, do they not admit that they had the whole quantity? It is true, that there is no proof of any one's having seen the corn upon the premises, but that is not conclusive. Trade could not go on, if the facts which have been proved were not to be considered as evidence of possession.

Verdict for the plaintiff.

Wilde, Serjt., and Evans, for the plaintiff.

Adams, Serjt., and Alderson, for the defendants.

ADJOURNED SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1826.

MACDOUGALL v. YOUNG.

Evidence is admissible in an action for tithes on stat. 37 H. 8, of the fact of some of the parishes in London paying at the rate mentioned in the decree, made by virtue of that statute, in order to raise a presumption that such decree had been enrolled, no entry of such enrolment being to be found; a copy of the decree annexed to the statute, in a printed copy obtained from the King's printer, being produced.

DEET for tithes. The first count in the declaration stated, that in and by a certain Act of Parliament, made in the 37th year of the reign of King Henry VIII., intituled "An Act for Tithes in London," it was among other things enacted, that such end, order and direction as should be made, decreed, and concluded by the Right Reverend Father in God, Thomas, then Archbishop of Canterbury, the Right Honorable Lord Wryothesly, then Lord Chancellor of England, and (several other persons, naming them,) or any six of them, before the 1st day of March then next ensuing, of, for, and concerning the payments of the tithes, oblations, and other duties within the city of London, and the liberties of the same, and enrolled in the King's High Court of Chancery of record, should stand and remain, and be as an Act of Parliament, and should bind as well all citizens and inhabitants of the said city and liberties, as the parsons, &c., of the said city, and their successors for *ever, according to the effect, purport, and intent of the said order and decree so to be The declaration then averred, that afterwards, and before made and enrolled. the said 1st day of March, to wit, on the 24th day of February, 1545, it was fully ordained and decreed, by the said Right Reverend Father, &c., that the citizens and inhabitants of the said city of London, and the liberties of the same for the time being, should yearly, without fraud or covin, for ever pay their tithes to the parson, &c., after the rate therein following, that is to say, of every 10s. rent by the year, of all and every house, &c., 161d., and of every 20s. rent by the year, 2s. 9d., and so above the rent of 20s. by the year, ascending from 10s. to 10s., according to the rate aforesaid. The declaration then alleged, that the said order and direction, or decree, was afterwards, and before the commencement of the suit, duly enrolled in the King's High Court of Chancery of Record, but that the same had since been lost by time and accident. There was also an averment of the plaintiff's title to sue as a person seised in fee of the impropriate rectory of the parish of St. Helen, Bishopsgate, within the city of London, and also of the defendant's liability to pay, as the inhabitant of a house in that parish. The second and third counts were for tithes bargained and sold; the fourth count was on a composition to pay 12l. 12s. a year: and there were also the common money counts.

The pleas were, 1st, the general issue, nil debet; 2d, a plea alleging, that under the statute no action could be maintained at law; 3d, a plea to nearly the same effect; 4th, a plea that the decree had not been enrolled in manner and form as averred in the declaration. To the 2d and 3d pleas the plaintiff

demurred,† and joined issue upon the 1st and 4th.

[†] In the case of Skidmore v. Bell, 3 Eag. & Y. Tithe Ca. 1202, a prohibition was granted to the Chancellor of the Diocese of London, on the ground that he had no jurisdiction of tithes under this statute; but in the case of Watts v. Warren, 3 Gwill. 1054, and 3 Eag. & Y. Tithe Ca. 1202, a plea to the jurisdiction of the Court of Exchequer, on a bill filed there for tithes under this statute, was overruled; and in the case of The Canons of St.

"A printed copy of the act declared upon, obtained from the King's printers, was produced in evidence. It had annexed to it a printed copy of what purported to be the decree in question. And a witness proved that he had searched at the Rolls Chapel and could not find the original decree there. Witnesses were then called to prove, that in some parishes in London some persons paid the 2s. 9d. according to the supposed decree.

Wilde, Serjt., objected. Proof of what is done in one parish is not evidence

to affect persons in another.

Onslow, Serjt., relied on an Anonymous case in 2 Ventris, 257;† Thurs-

ton v. Slatford, 1 Salk. 184; and the case of Knight v. Dauler.

*Best, C. J. I think the evidence is admissible. It is quite clear that the decree has been treated as enrolled, in the city. I do not receive the evidence of what is done in one parish as proving the custom in another. But it is proved, that in the printed statute book there is a copy of this decree, and I receive the evidence of payment as collateral proof of that which has been enrolled. Is the right of a party to be lost through the negligence of public officers? We must look to the evidence. It appears that different parishes have paid tithes in conformity with the decree; and in a case in which it became necessary to show a recovery in ancient demesne, the original being lost, other proof of its having been suffered was received in evidence.

The witnesses were then examined, but their evidence was not satisfactory in proving any uniform practice. On the contrary, it tended to show, that although the claim of 2s. 9d. was paid by some, yet its legality was disputed by others. Evidence was also given to show, that the defendant was under an agreement to pay 121. 12s. a year as a composition. The title of the plain-

tiff as impropriator was also proved.

Wilde, Serjt., for the defendant. The plaintiff alleges a right to 2s. 9d. in the pound, under a decree made in pursuance of the stat. of Hen. VIII. I submit, that no such decree was made and enrolled in pursuance of that statute. *There is no evidence of it. The document produced, I admit, is printed by the King's printer, and attached to the Act of Parliament, as if it were the decree. But that originated in the mistake of a learned person, (Restal,) who, in making an edition of the statutes, supposed that this document

Paul v. Crickett, 2 Ves. Jun. 563, the Lord Chancellor held, that the Court of Chancery had original jurisdiction on bill filed, without first applying to the Lord Mayor, saying that an Act of Parliament, creating a special jurisdiction, never onsta the jurisdiction of West-

minster Hall without special words.

† Ejectment on a trial at bar for lands in ancient demesse, in which there was shown a recovery in the court of ancient demesne, to cut off an entail which had been suffered long before, and the possession had gone accordingly. The recovery itself was not produced, because it had been lost, nor was any copy of it given in evidence. The Court admitted other proof, saying, "If a record be lost, it may be proved to a Jury by testimony, as the decree in Hes. VIII.'s time for tithes in London is lost, yet it hath been often allowed that there was one."

1 Mich. 12 Wm. III. B. R.—Assumpsit in C. B. for 51. received to plaintiff's use, being

† Mich. 12 Wm. III. B. R.—Assumpsit in C. B. for 51, received to plaintiff's use, being fees of the office of clerk of the peace of Oxfordshire. On non assumpsit, it was insisted that the plaintiff had forfeited his office by not taking the oaths required by law. To prove this fact, the record of the sessions was produced. To this evidence a bill of exceptions was tendered, which was removed into K. B. with the record, by writ of error; and Holt, C. J., held, that the record was evidence, saying, inter alia, "that, indeed, if there be a mis-entry, it might be supplied and corrected by other evidence, for a party should not be concluded by the mistake or negligence of the officer."

§ Hardr. 323.—"In ejections firms, for the rectory of Burghfield. Upon a demise for years and a trial at bar, the case, upon evidence, appeared to be, that the Earl of——, being a popish recusant convict, had presented the lessor; who thereupon was instituted and inducted into the said rectory. But the record of the conviction was burnt, as was supposed, amongst other records of the same nature in the Inner Temple; wherefore the defendant offered to prove it by other evidence. And it was held, by Hale, C. B., and the whole Court, that in such a case as this a record may be proved by evidence, because the conviction here is not the direct matter in issue, but is only inducement to it; as, if as appropriation were in issue, the King's license, if it could not be found upon record, might be proved in evidence without showing a record of it, although it be the foundation of the appropriation."

was the decree made under the statute, and, therefore, appended it to the statute. If a copy of it, contemporaneous with the act, had been produced, that might have been strong evidence of its existence. And even if there was a decree, to have binding force, it must have been enrolled. Now, has this supposed decree been enrolled? If it has, why has the claim lain dormant for years, and even centuries? Why was it not enforced about the time when the decree was made? There is not the slightest evidence of the enrolment. Nothing of the sort is to be found in the enrolment office; and as to the evidence of persons having paid at the rate claimed, that is easily accounted for, as some would rather submit to a demand of that sort than involve themselves in a lawsuit. Others, it appears, are actually contesting the point.

BEST, C. J., left these two points to the Jury. 1st, Whether they were satisfied that a decree had been made in pursuance of the statute of Hen. VIII.? and if so, whether that decree had been enrolled? And, 2d, Whether the defendant

had entered into an agreement of composition?

The Jury found that they were not satisfied that the decree was duly made

and enrolled, but that the defendant was under terms of composition.

Verdict for the plaintiff on the fourth count, and for the defendant on all the others.

Onslow, Serjt., and Henderson, for the plaintiff. Wilde, Serjt., and Patteson, for the defendant.

[Attornies—Macdougall & Co., and T. M. Vickery.]

*On the second day of the following Trinity Term, Onslow, Serjt., moved for a new trial. He cited Ivatt v. Warren, in the time of James I., reported in Gwillim, 1054; Western on the Tithes of London; and the case of Ward v. Hilder, Gwillim, 538; and Wood's Exchequer Cases, p. 305; and relied on the circumstance of no point having been made in any of those cases about the enrolment of the decree.

The Court granted a rule to show cause.†

† This rule has not yet been argued.

On the subject of tithes in London, see the stat. 37 Hen. VIII. c. 12, and the copy of the decree which immediately follows it; and also 2 Inst. 659; and the following cases: Green v. Piper, Cro. Eliz. 276; and 1 Eag. & Y. Tithe Ca. 105. Langham v. Baker, Hard. 116, 130; and 1 Eag. & Y. Tithe Ca. 428. Anon., 1 Gwill. Tithe Ca. 285. Dunn v. Burrell & Goffe, 1 Eag. & Y. 270; and 1 Gwill. 299. Shefield v. Pierce, 2 Gwill. 503; and 1 Eag. & Y. 576. Sayer v. Mumford, 2 Gwill. 546; and 1 Eag. & Y. 587. Kynaston v. Miller, 3 Gwill. 903; and 2 Eag. & Y. 196. Bramston v. Heron, 4 Gwill. 1314; and 3 Eag. & Y. 1359. Bennett v. Treppas, 2 Gwill. 633; and 1 Eag. & Y. 782. The Warden and Minor Canons of St. Paul's v. Crickett, 2 Ves. Junr. 563; and 2 Eag. & Y. 417. Same v. Morris, 9 Ves. 155; and 2 Eag. & Y. 516. Antrobus v. The East India Company, 13 Ves. 9; and 2 Eag. & Y. 544. The Minor Canons of St. Paul's v. Kettle, 2 Ves. & B. 1; and 2 Eag. & Y. 566. The Warden and Minor Canons of St. Paul's v. The Bishop of Lincoln, 4 Price, 65; and 3 Eag. & Y. 809. The Minor Canons of St. Paul's v. The Bishop of Lincoln, 4 Price, 65; and 3 Eag. & Y. 866; and Owen v. Nodin, 1 M'Cleland, 239; and 3 Eag. & Y. 149.

In Raithby's edition of the Statutes at Large, there is the following note immediately after the stat. 37 Hen. VIII. c. 12, and the decree:—"'N. B. This decree is not entered on the statute-roll of this year in Chancery; nor has it been found enrolled on any other roll in Chancery; nor is it annexed to the bill in the Parliament Office. It was not inserted in the earliest printed editions of the statutes. It is printed in Rastal's Abridgment of the Statutes, (edit. 1579, Title, Tithes,) and in Pulton's Stat. at Large, printed in 1618." However, on a reference to the authorities above cited, it will be found that several decrees in the Courts of Chancery and Exchequer have been made for payment secording to it.

eccording to it.

*SELLECK v. SMITH et al.

In an action of trover brought against the Treasurer of the West India Dock Company, for refusing to deliver articles deposited in the West India Docks, he is entitled to the protection of the Dock Act, which requires that actions for any thing done in pursuance or under color of that act should be brought within three months. And the circumstance of his having taken a bond of indemnity, is not a waiver of such protection.

Trover for a quantity of sugar, which a person named Pettit, to whom it had been consigned by the plaintiff, had pledged with two of the defendants, named Keeling and Drake. The other defendant, Smith, was the treasurer of the West India Dock Company, t in whose possession the sugar was, and who had refused to deliver it to the plaintiff's order, and for which refusal he was indemnified by Messrs. Keeling and Drake.

Bosanguet, Serjt., who appeared for Mr. Smith, submitted that he was entitled to a verdict, on the ground that the action had not been brought within three months, as required by the West India Dock Act, 39 & 40 Geo. 3, c.

69, s. 185. He cited Wallace v. Smith, 5 East, 115.

Vaughan, Serjt. This is a case in which the statute does not apply; the

act done must be one done in the execution of the statute itself.‡

BEST, C. J. At present, I think the Dock Company are within the protection of the statute, but I will give you leave to move to enter a verdict for the plaintiff.

Vaughan, Serjt. Does not your Lordship think, that the indemnity given so identifies Mr. Smith with the act of the other defendants, as to be a waiver

of his protection under the statute?

BEST, C. J. I think not. I think that Mr. Smith did *right in taking The Dock Company are so much dependent upon servants, that if parties were not to bring actions within a reasonable time, they would not be able to defend themselves.

A verdict was taken for Mr. Smith, with leave to Vaughan, Serjt., to move to enter a verdict for the plaintiff against him; and the verdict was for the plaintiff against the other two defendants; which verdict for the plaintiff was, after argument on a rule nisi for a nonsuit, confirmed by the Court.

Vaughan, and Taddy, Serjts., and F. Pollock, for the plaintiff.

Bosanquet, Serjt., for the defendant Smith.

Wilde, Serjt., and Jeremy, for the defendants Keeling and Drake.

[Attornies—Swain & Co., and Freshfield & Co.]

In the course of the ensuing Term, Vaughan, Serjt., moved, pursuant to the leave given at the trial, to enter a verdict for the plaintiff against the defendant Smith; but the Court were of opinion that he was entitled to the protection of the act, and, therefore, refused a rule.

! The words of the statute are, "for any thing done in pursuance or under color of this act."

[†] The Dock Act requires that the Company shall sue and be sued in the name of their Treasurer.

*ADJOURNED SITTINGS IN LONDON, AFTER EASTER TERM, 1826.

CLARK v. KING.

In assumpsit on an agreement to transfer a public-house, and assign the licenses, the parties binding themselves in a penalty for the performance of the terms, if the vendor could not assign the licenses, and the vendee had not the money ready at an appointment to settle the business, the penalty cannot be recovered; but if the vendee has paid a deposit, it may be recovered back.

A check upon a brewer's house is not sufficient in such a case, if tendered in payment, though it be proved to be the constant practice to use checks instead of money, in order to prevent robbery, on account of the lateness of the hour at which settlements take place in the transfer of public-houses.

Assumpsit; with a special count on an agreement, and the money counts.

The agreement was for the transfer by the defendant to the plaintiff of a public-house, together with the lease, and also for assignment of the licenses. A deposit of 40% had been paid by the plaintiff, and both parties bound themselves in the sum of 1001. each for the performance of the agreement. appointment was made to settle the business, which was attended by a clerk of Messrs. Combe & Co., the brewers, who had agreed to advance a part of the purchase-money to the plaintiff; but he had not with him the sum required in cash, but only a check on the house. It was stated, that this was the practice in almost every instance, in order to prevent robbery, as the business was usually transacted at very late hours.

BEST, C. J. If it was necessary that the plaintiff should have the money ready, I am clearly of opinion that the check of the most respectable house in

London will not do.

It appeared that the defendant was not in a condition to assign the licenses to the plaintiff.

Vaughan, Serjt., for the defendant, relied on the circumstance of the plain-

tiff's not being ready to pay in cash, as an answer to the action.

Wilde, Serjt., contended, that as the defendant was not in a situation to assign the licenses, it was not incumbent on the plaintiff to have the money ready, as it could never be deemed necessary for a party to do a nuga-

BEST, C. J. The question is, whether you can maintain your action for the penalty? I think you cannot, as you had not the money ready at the instant. Wilde, Serjt., submitted, that the plaintiff was entitled to recover back the deposit.

Vaughan, Serjt., contended that he was not.

BEST, C. J. It appears to me, that neither plaintiff nor defendant were in a condition to perform the agreement. They have been making a bargain which could not be carried into effect without their doing more than either of them has done. I think, as the defendant was unable to perform that part of the agreement by which he undertook to assign the licenses to the plaintiff, that the contract is at an end, and the plaintiff is entitled to recover his deposit.

Verdict for the plaintiff—Damages 401.

Wilde, Serjt., and Patteson, for the plaintiff. Vaughan, Serjt., for the defendant.

*COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER TRINITY TERM, 1826

BEFORE LORD CHIEF JUSTICE ABBOTT.

BOOTH v. HANLEY et al.

If a party be turning towards the wall in a street at night, for a particular occasion, a watchman is not justified in collaring him, to prevent his so doing.

Asssult and false imprisonment. Plea-General issue. (There were also

several justifications, but they were not proved.)

The defendant Hanley was a police officer; and it appeared, that at about half-past ten o'clock on the night of the 1st of October, 1825, the plaintiff was m Paul street, Finsbury, and that he was turning to the wall for a particular occasion, when a watchman came up to him and collared him; and on this, a scuffle ensuing between the plaintiff and the watchman, the defendant Hanley came up, and (with the other defendants) took the plaintiff to the watch-house of St. Leonard, Shoreditch, where he was locked up.

ABBOTT, C. J. (In summing up the case to the Jury.) The watchman certainly had no right to go up to a man and collar him for that which the plaintiff appears to have been doing. He might have gone up to him and remonstrated with him, or have asked him to go somewhere else; but he clearly had

ao right to assault him for that.

Verdict for the plaintiff.—Damages, 20%.

Scarlett, C. Phillips, and E. Quin, for the plaintiff Denman, and George, for the defendants.

[Attornies—Harmer, and Amory & C.]

DOE, on the demine of UBELE, v. KILNER.

F*289

An examined copy of the registry of a deed in the registry of the county of Middlesex, is admissible as secondary evidence of its contents.

EJECTMENT for a small piece of land in the parish of Christ-church, Spital-fields.

The lessor of the plaintiff claimed the land in question as part of his free-

hold, to which it adjoined.

To show his title, a clerk of the attorney for the lessor of the plaintiff proved, that he had carefully searched among the deeds and papers of the lessor of the plaintiff, and could not find any deeds of lease and release of the dates of the 23d and 24th of May, 1735. The witness then produced an examined copy

of the registry of those deeds, taken from the original registers of them in the registry office in the county of Middlesex.

These copies were put in and read as secondary evidence of the deeds Ne objection being made to their admissibility on the part of the defendant,

The case was referred.

Denman, and Carrington, for the lessor of the plaintiff. Chitty, and C. Sheppard, for the defendant.

[Attornies—Murray & Son, and Harman.]

Registers of all deeds, conveyances, and wills, affecting real property in the county of Middleses, are made in pursuance of the stat. 7 Ann. c. 20; by the 1st section of which it is enacted, "That a memorial of all deeds and conveyances, which from and after the 29th day of September, in the year of our Lord, 1709, shall be made and executed, and of all wills and devises in writing, made or to be made and published, where the devisor or testatrix shall die after the said 29th day of September, of or concerning, and whereby any honors, manors, lands, tenements, or hereditaments in the said county, may be any way affected in law or equity, may be registered in such manner as is hereinalter directed; and that every such deed or conveyance, that shall at any time after the said 29th day of September be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered as by this act is directed, before the registering of the memorial of the deed or *290] *conveyance under which such subsequent purchaser or mortgagee shall claim; and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered at such times and in such manner as is hereinafter directed." By the 5th and 6th sections of the same statute, it is enacted, "That all and every memorials, so to be entered and registered, shall be put into writing in vellum or parchment, and brought to the said office, and in case of deeds and conveyances shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance; which witness shall, upon his oath before one of the said registers, or masters, or before a Master in Chancery, ordinary or extraordinary, prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial; and in case of wills, the memorial shall be under the hand and seal of some or one of the devisees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one whereof shall, upon his oath before the said registers or masters, or before such Master. m Chancery as aforesaid, prove the signing and sealing of such memorial; which respective eaths the said registers or masters, and Masters in Chancery, are hereby empowered to administer, and shall indorse a certificate thereof on every such memorial, and sign the same."—" That every memorial of any deed, conveyance, or will, shall contain the day of the month and the year when such deed, conveyance, or will bears date, and the names and additions of all the parties to such deed or conveyance, and of the devisor or testatrix of such will, and of all the witnesses to such deed, conveyance or will, and the places of their abode, and shall express or mention the henors, manors, lends, tenements, and hereditaments contained in such deed, conveyance, or will, and the names of all the parishes, townships, hamlets, precincts, or extraparochial places within the said county, where any such honors, manors, lands, tenements, or hereditements, are lying or being, that are given, granted, conveyed, devised, or any way affected or charged by any such deed, conveyance, or will, in such manner as the same are expressed or mentioned in such deed, conveyance, or will, or to the same effect; and that every such deed, conveyance, and will, or probate of the same, of which such memorial is so to be registered as aforesaid, shall be produced to the said registers or masters at the time of entering such memorial, who shall indorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time on which such memorial is so entered or registered, expressing also in what book, page, and number the said same is entered; and that the said registers or masters shall sign the said certificates shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever; and that every page of such register books, and every memorial that shall be entered therein, shall be numbered, and the day of the month, and the year, and hour, or time of the day when every memorial is registered, shell be entered in the margents of the said register books, and in the margents of the said memorial; and that every such register or master shall keep an alpha-betical kalendar of all parishes, extraparochial places and townships within the said county, with reference to the number of every memorial that concerns the honors, manors, lands, tenements, or hereditaments in every such parish, extraparochial place or township respectively, and of the names of the parties mentioned in such memorials; and that every such register or master shall duly file every such memorial in order of time as the same shall be brought to the said office, and enter or register the said memorials in the same order that they shall respectively come into his hands." And to prevent the falsification of these registries, it is by the 15th sect. enacted, "That if any person or persons shall at any time Vol. XII.—73

forge or counterfeit any entry of the scknowledgment of any such memorial, certificate, er indorsement, as is herein mentioned or directed, and be thereof lawfully convicted, such person or persons shall incur and be liable to such pains and penalties as in and by an act made in the fifth year of Queen Elisabeth, initialed. An act against forgers of false deeds and writings, are imposed upon persons for forging and publishing of false deeds, charters or writings, sealed court rolls or wills, whereby the freehold or inheritance of any person or persons of, in or to any lands, tenements, or hereditaments shall or may be molested, troubled, or charged; and that if any person or persons shall at any time forsever himself before the said registers or masters, or before any Judge, or Master in Chancery, in any of the cases herein mentioned, and be thereof lawfully convicted, such person or persons shall incur and be liable to the same penalties as if the same oath had been made in any of the courts of record at Westminster." This species of secondary evidence is not often resorted to; but it is accessible to everybody. The memorial does not contain every thing that is contained in the deed, but it often happens that it may contain what a party wants to prove. As to the registry of deeds in the county of York, see the stat. 2 & 3 Ann. c. 4; 5 & 6 Ann. c. 18; 6 Ann. c. 35; and 8 Geo. 2, c. 6.

*FLEMINGTON v. SMITHERS.

F*293

If the plaintiff's son, who was in fact his servant, in delivering percels from a stage-coach, receive an injury, by which the father is deprived of his services, the father is not entitled, as part of the damages in an action for loss of his son's services, to have a compensation for the injury done to his parental feelings.

Case by the plaintiff, the proprietor of a stage-coach, against the defendant, the owner of a wagon, for the negligence of his servant in driving the wagon, whereby the plaintiff's son and servant was thrown off the plaintiff's coach and injured, per quod servitium amisit. Plea—General issue.

It appeared, that the plaintiff's son delivered parcels for the plaintiff, who acted as coachman to his own coach; and the son, who was a lad of about fifteen, was paid half the parcel-money by his father as wages. At the time of the accident he was thrown off the coach, and being much injured, he was taken to an hospital, where his mother took him clean linen, and such things as were not there provided.

The defence was, that there was no negligence in the defendant's servant.

Marryat, in reply, contended, that if the plaintiff recovered, the mere loss of service ought not to be the measure of damages; but that, as the party in question was the son as well as the servant of the plaintiff, the Jury ought to give a further compensation for the injury to the plaintiff's parental feelings, the same as in cases of seduction, which were, in point of form, actions for loss of services like the present.

ABBOTT, C. J., (in summing up.) With regard to the amount of damages, I should tell you, that this action is brought to recover such sum as you (the Jury) may think the plaintiff entitled to for the loss of the services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must end of the assistance of his place, and also some small compensation for his mother going to visit him as she did. But beyond those things, it appears to me, that you ought not to go in your estimate of damages.

Verdict for the plaintiff—Damages 201.

Marryat, and Gunning, for the plaintiff. Scarlett, and Andrews, for the defendant.

With regard to actions for seduction, in the case of Chambers v. Irwin, tried at the Bristel Assizes, 1800, (2 Selw. N. P. 1100,) it was laid down by Lord Eldon, that the Jury, in calculating the quantum of damages, were not to look merely to the loss of service, which might smount only to a few pounds, but also to the wounded feelings of the party. However, in the case of Irwin v. Dearman, Lord Ellenborough said, that it had always been considered as an action sui generis, where a person standing in the relation of a parent or in loco perentis, is permitted to recover damages for an injury of this nature after the mare loss of service. sites the mere loss of service.

PROMOTIONS.

In this Vacation, Sir John Singleton Copley, Knt., his Majesty's Attorney General, was appointed Master of the Rolls, vice Lord Gifford, deceased.

Sir Charles Wetherell, Knt., was appointed Attorney General, vice Sir J. S. Copley.

sel learned in law.

Nicholas Conyngham Tindal, Esq., was appointed Solicitor General, vice Sir C. Wetherell. Charles Christopher Pepys, Esq., was appointed one of his Majesty's coun-

*294] *COURT OF KING'S BENCH.

ADJOURNED SITTINGS AT GUILDHALL, AFTER TRINITY TERM, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

SAUNDERS v. MUSGRAVE, Bart.

If an agreement for the assignment of a piece of ground, on payment of a sum of 12601., contain a clause, that the party agreeing to take the assignment shall pay and allow, at the rate of 1001. per annum, from the time of taking possession until the completion of the purchase, in equal half yearly payments; a sheriff on a writ of f. fa. ought not, under such clause, to treat the 1001. as rent, and deduct it out of the proceeds of the

Assumpsit for money had and received. From the admissions in the cause, it appeared that a writ of fieri facias, at the suit of the plaintiff, against a person named Mohun, was delivered to the defendant, who was High Sheriff of Glou

centershire, in October, 1825. The defendant sold under the writ, and paid to a person named Tucker, a sum of 50L, which, it was alleged, he was entitled to demand as half a year's rent, which became due in the previous month of July, under an agreement dated the 22d December, 1824. By the agreement, Tucker undertook that he would assign to Mohun a certain plot of ground, with a house, &c., for the residue of a term of years for which he held them, on the payment of a sum of 1260l. The clause on which the defendant relied was in the following terms:—"And it is agreed, that in the mean time, and until the said assignment be made, he, the said H. H. Mohun, shall pay and allow unto the said Joseph Tucker, at the rate of 190L per annum, from the time of taking possession of the said premises until the completion of the said purchase, in equal half yearly payments."

Mohun was called as a witness, and proved that he went into possession of the premises on the 9th or 10th of January, 1825; that a room which was to have been built in the month of March was not built at all: that he had to put in stoves which ought to have been supplied by Tucker, *for which [*295 Tucker was to pay him 121.; in addition to which he had advanced

him a sum of 10l.

Marryat, for the plaintiff, referred to the case of Dunk v. Hunter, 5 B. & A. 322.†

Campbell, for the defendant. In Dunk v. Hunter, there was no rent specified to be paid in the mean time; but in this case there is a specific sum of

100/. a year to be paid.

ABBOTT, C. J. The question is, whether it is to be considered as rent, or to be taken into account afterwards? It would make a great difference to the parties. For 100% would considerably exceed the interest. The words of the agreement specify both the sum and the time. It seems to me that there is no fact to be left to the Jury.

Campbell. Then perhaps your Lordship would nonsuit the plaintiff.

ABBOTT, C. J. According to my present view of the case, I think the plaistiff is entitled to a verdict. But I will give you leave to move.

Verdict for the plaintiff—Damages, 504.

Marryat, and F. Kelly, for the plaintiff. Campbell, for the defendant.

[Attornies—Overton & C., and Hammon.]

*On the first day of the ensuing *Michaelmas* Term, *Campbell* moved in pursuance of the leave given at the trial, and the Court granted a Rule to show cause.

That case decides, that a landlord has no right to distrain, unless there be an exist demise to the tenant at a fixed rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for twenty-one years, at the net clear rent of 63L, the tenant to enter any time on or before a particular day:—it was held, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

EVANS v. CURTIS et al.

In assumpest on a written agreement, where the attesting witness to the execution was not produced at the trial: it was held sufficient, in order to let in evidence of his handwriting, to prove by a person who knew him, but had not seen him for eighteen months, that at the request of the plaintiff's attorney, he had made inquiry for him at coffee houses and other places, where he thought he might hear of him, but without success; and that it was not necessary to show that inquiry had been made of both the parties who had

It was not necessary to show that inquiry had been made of both the parties who had executed the agreement.

An agreement for letting premises (under hand only) was signed "H. Curtis & Co.;" and it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose handwriting it was signed.—Held, upon evidence that both persons acted in the business, that there was sufficient proof of an execution by the partnership.

If an agreement for letting part of a house, at a rent of 30L, contain a clause, that the tenant shall be liable only to the said rent, such clause is a clause of indemnity, and an action will lie upon it, if the tenant's goods are seized under a distress for rent by the original landlord though the party giving the indemnity he not the impact of such landlord, though the party giving the indemnity be not the immediate tenant of such original landlord. But if no notice be given to the party indemnifying, that he may pay the rent and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts.

THE declaration stated, that before and at the time, &c., one Henry Ibbettson was the superior landlord of a certain messuage, &c., and the said defendants were tenants of a certain part thereof; and, thereupon, in consideration that the said plaintiff had become tenant to the said defendants of a certain part of the said messuage, &c., at the yearly rent of 301., they, the said defendants, undertook, &c., to indemnify and save harmless him, the said plaintiff, from and against the payment of any rent payable to the said Henry Ibbettson, as such superior landlord as aforesaid. The declaration then went on to allege. that the defendants neglected to indemnify the plaintiff according to their promise, in consequence of which a distress was put into the premises by *libbettson* for a sum of 55*l.*, under which the plaintiff's goods were sold, and he was greatly injured in his business. There were the usual money counts, and the plea was—Non assumpsit.

The agreement between the parties was as follows:—"Memorandum of agreement, made 24th day of June, 1825, between Henry Curtis & Co., of Uxbridge, on the one part, and William Evans, of Fleet Street, fishmonger, of the other part. The said Henry Curtis agrees to let unto the said William Evans, his under-tenant, and assigns all the back part of the ground floor of dwelling house, situate No. 1, Lawrence Lane, Cheapside, London, to hold the same from Midsummer-day last past, from year to year, during the time of the said Henry Curtis & Co.'s holding of it, and under the clear yearly rent of 301., payable half yearly to the said Henry Curtis & Co. It being the express intention of the parties hereunto, that the said William Evans shall be liable only to the said rent of 30l. And further, that the said William Evans agrees to take the premises, &c., &c.

"Witness. "John Lowe. (Signed)

"H. Curtis of Co. "Wm. Evans."

The subscribing witness, John Lowe, was not produced; but a person was called, who proved that he had not seen him since eighteen months before, at which time he kept the Echo Office for servants, in Lawrence Lane, London, which office had been shut for a twelvemonth; that, at the request of the plaintiff's attorney, he had made every search for Lowe at different coffee houses, and other places, but he could not find him. It was then proposed to prove Lowe's handwriting.

Comun, for the defendants, objected. Enough has not been done to let in parol evidence. Inquiries should have been made of the parties to the agree-

ment.

ABBOTT, C. J., thought that the evidence should be received.

A servant of the plaintiff's proved that the defendants (who were Curtis & Baker) were in partnership, under the firm of H. Curtis & Co., and that he

had seen them both frequently on the premises.

The father of Ibbettson granted a lease of the premises to a person [*298 named Fisher, who assigned to one Kennett, who granted an under lease to Gibbons, who assigned the under lease to Embden, who let the premises in parts to the defendants and others. The plaintiff's goods had been sold under a distress, for 55l. due to Ibbettson.

Comyn, for the defendants. The plaintiff must be called. There is no evidence of the execution of the agreement by Thomas Baker, one of the

defendants.

ABBOTT, C. J. The signature may be Baker's for aught I can tell. I think there is enough to show that both defendants are parties to the agreement. There is evidence of their acting together, which shows a partnership,

and one partner may bind another except by deed.

Comyn. I submit that there is not evidence of a partnership: but if there be a lease, it is not that sort of document which a partner is authorized to execute for a firm. The interests of two partners may be distinct as to the right in the premises. I submit, also, that the action is not maintainable against the defendants. There are no words on the face of the instrument which at all touch the question of indemnity against any title. The plaintiff has declared specially on an indemnity against *libettson*. Now, the relation of landlord and tenant, as between Ibbettson and the defendants, does They must show that the party against whom the action is brought is the party liable to pay the rent.

ABBOTT, C. J. They must show that the premises were subject to the

payment.

Comyn. It is the fault of Fisher's representatives: the defendants were not liable to pay, therefore they are not liable in this action. There is no evidence

that the premises belonged to the partnership.

*Abbott, C. J. Supposing the handwriting of the attesting witness to be proper evidence of the handwriting of the party, there is abundant evidence of an arms. dant evidence of an execution by the partnership. Both partners act in the matter, and that is a ratification. The written agreement is not quite so bare as is supposed, for it contains this clause: "It being the express intention of the parties present, that the said William Evans shall be liable only to the said rent of 301." The question is, Whether that is not in effect an engagement to indemnify against any other rent? I think it is. But it does not appear that any notice was given to the defendants that they might pay the Therefore, I think, the plaintiff cannot recover on the special count.

The plaintiff had a verdict on the common counts for a sum of 40%. being the remainder of the amount distrained for, after deducting a sum of 151. due from him to the defendants for rent, which it was

agreed should be settled in this way. Campbell, and Platt, for the plaintiff.

Comyn, for the defendants.

[Attornies-T. Miller, and Allen & Co.]

*3017

Verdict for the plaintiff.

*KERBY v. ENGLAND.

If a letter, giving notice of the dishonor of a bill, contain this passage—"I did not know till within these few days, where you were to be found"—such passage is not to be taken as proving that the notice was not given on the next day after the residence of the party was discovered.

Assumpser on a bill of exchange, by the indorsee against the drawer.

Notice of dishonor had not been given for several months; and to account for this delay, one of the indorsers of the bill proved, that as soon as he could find the party who paid the bill to him, he inquired for the defendant, and was told that he kept a public-house in the neighborhood of Hackney, Homerton, or Clapton, and that he then inquired for him at those places, but was not able to find him sooner. The letter which contained the notice had this passage in it:-- I did not know, till within these few days, where you were to be found."

Chitty, for the defendant, submitted, that due diligence had not been used in giving him notice. The letter was an admission that his address had been known for several days before; and a notice ought to be given on the very next day after a party is discovered.

ABBOTT, C. J. For aught I can tell, "within these few days" may mean

the previous day: I cannot say that it does not.

Chitty. If I prove that the defendant has lived in the same house for seve

ral years, does your Lordship think that fact will vary the case? ABBOTT, C. J. I think not. Everybody is not bound to know every pub lican in a place.

Denman, C. S., and Abraham, for the plaintiff. Chitty, for the defendant.

[Attornies—F. Hill, and In Person.]

*GUTHRIE et al., Assignees of DEVEREUX, a Bankrupt, v.

CROSSLEY.

A trader stopped payment generally on the 5th of January; and on the evening of the 6th, sent a 100% note to a particular creditor, saying it was to help him over his payments. Held, that such trader afterwards becoming bankrupt, his assignees might recover the money in assumpsit, although it appeared that, at the time of payment, a bill for a larger amount was becoming due, which had been accepted by the creditor for the bankrupt's accommodation, and for which he had promised to provide; and that the creditor could not be considered as the agent of the bankrupt to pay the money for the bill, because, he being a party to it, the nawment operated are trate in his discharge. because, he being a party to it, the payment operated pro tanto in his discharge.

Assumers for money had and received. The commission was dated the 27th of January, 1826, and the assignment the 28th of February.

The bankrupt's clerk proved, that the bankrupt stopped payment on the 5th of January: that on the evening of the 6th, he directed him to carry a 2001. Bank of England note, which he took from his cash-box, to the defendant Crossley. The witness was then asked what he said to the bankrupt upon receiving the note.

Gurney, for the defendant, objected to the receiving evidence of statements made in the defendant's absence.

ABBOTT, C. J., thought the question a proper one, as the inquiry was into the bankrupt's motives, for which purpose it might be important to hear the

answers which he gave to the witness.

The witness then stated, that he asked the bankrupt why he was to take the money to Crossley. The bankrupt answered, to help him over his payments. The witness said, "You may do as you please, sir; but, if I were you, I would do no such thing: I would not commit myself with any party, but would take care of what there is, and not make the effects liable in any way." The bankrupt said, "I don't know what to do: I promised to sead him 200!." The witness said, "At all events, send him only 100!.; it is as well to risk but half of it." The bankrupt said, "Well, do as you please." The witness accordingly took 100! to the defendant, and received two post-dated checks for the amount.

It appeared from the cross-examination of the witness, that a bill was becoming due the next day, which the defendant "had accepted for the bankrupt's accommodation, for 1791., and for which the bankrupt was to provide; and it seemed from the balance-sheet, that on the whole account between the parties, the bankrupt was indebted to the defendant in a sum of

148l.

Marryat, for the plaintiff, relied on the case of Poland, assignee of Melanscheg, a bankrupt, v. Glyn.†

ABBOTT, C. J., inquired of Mr. Gurney if he could distinguish that case

from the present?

Gurney submitted, that the defendant in this case was the agent of the bank-

rupt to make the payment for the bill.

ABBOTT, C. J. I cannot consider it in that light. If the defendant had not been a party, but the bill had been merely made payable at his house, then, like any servant, he might receive the money with one hand, and pay it over with the other; but as he is a party to the bill, it is for his discharge pro tanto. I cannot myself distinguish this case from that of Poland v. Glyn, but I will give you leave to move the Court for a nonsuit.

Verdict for the plaintiffs.

Marryat, and E. Lawes, for the plaintiffs. Gurney, for the defendant.

[Attornies—Downs & G., and Walker & Co.]

*FAYLE v. BIRD.

[*303

Semble, that in assumpsit on a bill of exchange against the acceptor, where the bill is drawn payable to order in London, it is necessary to prove presentment at some place in London.

Assumest on a bill of exchange. Drawer against acceptor. The bill was drawn payable to order in London. The cause was not defended.

†2 Dow & Ry. 310. In that case it was held, that if a person in trade pays a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably believe bankruptcy probable, but not inevitable, at the time he makes such payment, & is fraudulent within the meaning of the bankrupt laws; and if bankruptcy alterwards through the assignees may maintain assumpsit for money had and received to their use, against the person to whom such voluntary payment has been made.

Ansert, C. J., thought it necessary for the plaintiff to prove presentment at some place in London, which not being in a situation to do, he was

Nonsuited.

But leave was given for a smotion to the Court to enter a verdict for the plaintiff.

Hutchinson, for the plaintiff.

[Atternies-Smith & W., and Robinson & B.]

In the ensuing Michaelmas Term, Hutchinson moved pursuant to the leave given, and cited Selby v. Eden.;

The Court, on the authority of that case, granted a

Rule to show cause.

MANVELL v. THOMSON.

In trespase for seducing the plaintiff's niece and servant, per quod servitium aminit; evidence that the party seduced (being about sixteen years of age) occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master and servant between the uncle and niece: and such relation is not destroyed by the circumstance of the niece's being entitled, on her coming of age, to a sum of nearly 5001, of which the interest is applied in the mean time for her benefit.

Freof in such case, that the niece, after her seduction and abandonment by the defendant, returned to her nucle's house, where she continued some time in a state of great agitation, and received medical attendance, and was obliged to be watched, lest she should do herself some injury, is sufficient to raise the presumption of that loss of service by the uncle, which is necessary to maintain the action.

Transpass for seducing the plaintiff's niece and servant.

The plaintiff was a ticket-porter, and his niece, the subject of the action, was a girl of about sixteen years of age, whose parents had been dead some years. A sum of nearly 500l. a-piece was left by her parents to herself and her brothers and sisters, which was deposited in the Bank till they should come of age. She was brought up at her uncle's, and was for some time out at service, but returned to her uncle's house previously to the time when she was debauched by the defendant. It appeared that while she was at her uncle's, who had several children, she assisted them in the domestic business of the house, as they kept no regular servant.

Denman, for the defendant. The action is not maintainable: the evidence of service is too slight. The presumption of her being a servant to her uncle is rebutted by the fact of her having so large a sum of money; and the relation

of uncle and niece is not of itself sufficient.

ABBOTT, C. J. Certainly the relation of uncle and niece of itself will not do: but I think there is enough in the evidence to constitute the relation of master and servant. Suppose a son has money enough to find himself in clothes, the relation of father and son is not destroyed by that circumstance. In this case, the uncle is in loco parentis. The smallest degree of service will

[†] This case decides, that where a bill is accepted payable in *London*, presentment of it there need not be averred in the declaration.—11 J. B. Moore.

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do. It seems there was no servant kept; and it is reasonable to conclude, that all the members of the family assisted in turn in the performance of the household work.

The cousin of the girl, and a surgeon, proved, that when she returned to her uncle's house, after she had been seduced and abandoned by the defendant, she was in a state of very great agitation, and continued so for some time: that she received medical attendance, and was obliged to be watched, lest she should do herself some injury. This was taken as evidence raising the presumption of loss of service by the uncle; and he had a

Verdict—Damages 400l.

*J. Williams, and Law, for the plaintiff. Denman, C. S., for the defendant.

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[Attornies-J. Platt, and Michell.]

The general evidence in cases of this description, to prove loss of service, is the fact of the birth of a child, and the sickness and confinement which are attendant upon it: but, is the present case, the party had no child; and therefore the above was the only evidence given to support that part of the case.

FAWCETT, Gent., One, &c., v. WRATHALL.

In assumper on an attorney's bill, where the charges are for business done for two persons, partners; if one only is sued, and there is no plea in abatement, the other may be called as a witness for the plaintiff.

Assumest on an attorney's bill. The charges were partly for preparing briefs for counsel to attend before the commissioners on the behalf of the defendant, and a person who was in partnership with him when they had become bankrupts.

This partner was called as a witness for the plaintiff.

Marryat, for the defendant, objected to his testimony, on the ground of interest.

F. Pollock, for the plaintiff, stated, that, in a case from the Northern Circuit, the Court of King's Bench, a few Terms previously, had decided, that if a contract is joint, and only one is sued, if there be no plea in abatement, the party who is not sued is a competent witness even to prove the defendant's liability.

ABBOTT, C. J., disallowed the objection.

It appeared that separate bills had been delivered to the defendant and the witness, and that the witness had paid his.

Verdict for the plaintiff.

F. Pollock, for the plaintiff. Marryat for the defendant.

[Attornies—Fawcett, and Chester, junr.]

*MYERS v. TAYLOR, Gent., One, &c.

A plea "puis darrein continuence" may be received at Nisi Prius on paper, and need not be transcribed upon parchment.

CHITTY, for the defendant, tendered a plea puis darrein continuance. It was on paper.

Platt, for the plaintiff, submitted, that it ought to be put upon parchment:-

it is to form part of the record.

ABBOTT, C. J., observed, that he had inquired of Mr. Bellamy, who said

that it was usual on circuit to put such a plea upon parchment.

Scarlett, as amicus curiz, remarked, that the plea at Nisi Prius is pleaded ere tenus, and is afterwards transcribed by the clerk of Nisi Prius on the record, and it is a mere matter of form whether it is on parchment or not.

Chitty mentioned that his Lordship had decided in a similar case before,

that the plea need not be transcribed on parchment.

ABBOTT, C. J. Mr. Chitty has referred me to a former decision of my own; I shall act in unison with that decision, and receive the plea upon paper.

The plea was received, and the cause, of course, could not be tried. Platt, for the plaintiff.

Chitty, for the defendant.

[Attornies—Scargill & R., and Cottle.]

*307] *ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1826.

BOURKE v. WARREN et al.

If, in a libel, asterisks be put instead of the name of the party libelled, to make it actionable, it is sufficient that the party should be so designated, that those who know the plaintiff, may understand that he is the person meant; and it in not necessary that all the world should understand it. But if witnesses, who state that they understand that the plaintiff is the person, also say that they were enabled so to understand by the perusal of another libel, with which the defendant had no concern, their evidence ought to be laid out of the case.

If a letter, set out as inducement, be alleged to contain "the words and matter following;" and when the letter is read in evidence, it is found to contain all that is stated in the

declaration, and something more, this is no variance.

This was an action for a libel published in the Courier newspaper, accusing the plaintiff of being the writer of a fabricated letter, signed "Jo. Evans."

The declaration stated, that the plaintiff, before, &c., was accustomed to attend at a certain police-office, commonly called the Marlborough Street police-office, to collect information, and was commonly known by the description of the Times reporter; and that Charles Burton Lane appeared there, and made information on oath, that a person had committed an indecent assauk on him. That one John Grosset Muirhead was apprehended, and was com-

mitted on that charge; and that Robert Spilsbury, to whom Lane was an apprentice, was bound by recognizance for the appearance of Lane to give evidence against Muirhead; and that before the publishing, &c., of the scandalous, &c., libel hereinafter next mentioned, on, &c., at, &c., a certain letter was addressed, written, and sent to the said Robert Spilsbury, which said letter contained the words and matter following, of and concerning the said John Grosset Muirhead, and of and concerning the said charge, and of and concerning the said Charles Burton Lane, and of and concerning the said Robert Spilsbury, and of and concerning the said recognizance. (The letter was here set out verbatim with innuendoes. It contained a request that Mr. Spilsbury would get Lane out of the way, and a promise of indemnity, and a present of 500%, and so far the letter was set out exactly as it really was; but in the declaration it went on:) "As there is nothing unworthy a perfectly honest man in what I (meaning the writer of the said letter) propose, and which you (meaning the said Robert Spilsbury) may with perfect *propriety accede to, I (meaning the writer of the said letter) shall expect a written answer." (It then set out the letter, which (It then set out the letter, which was signed Jo. Evans to the end.) The declaration then stated, as inducement, a paragraph in the Courier newspaper, in which it was stated that the letter had been written by a person who had been sued, and also a letter written to the magistrates at the Marlborough Street police-office, by a person named Edmonds, (which letter was a copy of the libel, except that the part of it, in which were five asterisks in the libel, was supplied with the words "Times reporter" in this letter, and then the libel itself was set out. The libel itself professed to be a copy of the letter of Edmonds. That letter, as stated in the libel, asked the magistrates to declare that Edmonds was not the author of the fabricated letter, (signed Jo. Evans;) and the libel went on to say, that if the magistrates would not, "the only alternative I (meaning the said Edward Edmonds) now have, is to state that the * * * * (meaning the said plaintiff,) is the person accused by Mr. H. of fabricating the letter sent to Mr. Spilsbury. Plea—General issue.

When, as a part of the proof of the introductory averments, the letter, signed Jo. Evans, was put in, it was verbatime the same as stated in the declaration, except that one paragraph of it was as follows:—"As there is nothing unworthy a perfectly honest man in what I propose, and which you may with perfect propriety and safety accede to, I shall expect a written answer."

Scarlett, and F. Pollock, for the defendants, objected that this was a variance; the word safety conveying a different sense from the word propriety; the one, in this case, meaning the absence of legal guilt, the other moral correctness;

and, from the context, those words evidently bore different meanings.

*Gurney, and Platt, contra. This letter is not the libel complained of, and we do not profess to set out the exact words; we only say, that the letter contained "the words and matter" that we have set forth; and it does so: and though it may contain two words more, we have proved all that we have alleged.

ABBOTT, C. J. This is not a variance. This letter is mere inducement, and not the libel itself. This letter, no doubt, must be set out with a certain degree of correctness, but it need not be in the exact words; all that is or need be alleged, is the substance, or so much of it as is necessary, which is here proved

as laid.

In the libel the party libelled was designated by five asterisks. To prove that the plaintiff was the person meant, Mr. Roe, the magistrate, and Plank, an officer of the Marlborough Street police-office, proved that they understood it to mean the plaintiff; but they both stated that they did not derive their knowledge entirely from the perusal of the libel itself, but partly from the letter

[†] This was the only passage in the libel which could by any possibility apply to the plaintiff.

of Edmonds, which had been sent to Mr. Roe, in which the words "Times

reporter" were introduced instead of the five asterisks.

Another witness proved, that he considered the plaintiff was the person meant, because, in the first Courier newspaper, which was mentioned in the declaration, the writer of the letter to Mr. Spilsbury was asserted to be a person who had been sued by Mr. H.

On this evidence, the defendants' counsel went to the jury, on the ground that it was not sufficiently shown that the plaintiff was the person meant by

the libel.

ABBOTT, C. J., (in summing up to the jury.) The question for your consideration is, whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant? It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant. With regard to the evidence of Mr. Roe, and of Plank, I think you ought to lay that out of the case, because they had seen the written letter of Edmonds, (with which the defendants had nothing to do.) and, therefore, they partly derive their information from that. In the prior newspaper some allusion was made to a person who had been sued, and that was what guided the last witness. You must, therefore, consider, whether the two newspapers showed to those who knew the plaintiff, that he was the person meant. Verdict for the defendants.

Gurney, and Platt, for the plaintiff. Scarlett, and F. Pollock, for the defendants.

[Attornies-G. Gill, and T. & S. Pearce.]

In Hard's case, Trin. 12 Ann. (1 Curw. Hawk. 543,) it was resolved, that a defamatory writing, expressing only one or two letters of a name, in such a manner that, from what goes before and follows after, it must needs be understood to signify such a particular per-1 son, in the plain, obvious, and natural construction of the whole, is as properly a libel as if it had expressed the whole name at large.

WEBBER v. VENN.

A notice of set-off can only be given with the plea of the general issue. If there be any other plea besides the general issue, the set-off must be pleaded.

Assumers. The declaration stated, that the defendant was employed as slerk to the plaintiff, and that he undertook to obey the directions of the plaintiff, and that he was directed to accept bills to the amount of 2400% only: but that, not regarding, &c., he accepted bills to a greater amount. There were also the common money counts. Pleas—The general issue; the statute of limitations; with a notice of set-off.

*ABBOTT, C. J. I observe that there are the general issue, and a plea of the statute of limitations, with a notice of set-off. This is wrong: I think it proper to mention it, as this is a mistake sometimes made. A notice of set-off cannot be given with any other plea but the general issue. In all other cases, a set-off must be pleaded.

Verdict for the plaintiff—Damages 5000l. by consent.

Scarlett, and F. Pollock, for the plaintiff.

Gurney, for the defendant.

PARKIN v. FRY.

If a person who is the inventor of a scheme get gentlemen to act as a committee, with intention of forming a joint-stock company to carry it into effect, and he himself act as secretary to the committee, he cannot maintain an action against one of the committee for his services as such secretary, or for his trouble, or for journies he undertakes in furtherance of the execution of the scheme.

Assumpsit. The declaration stated, that in consideration that the plaintiff would permit the defendant and others to use an invention for which he had obtained a patent, the defendant promised to pay, &c. There was also a count for work, labor, and journies performed, and the common money counts. Plea—General issue.

It appeared that the plaintiff had invented a mode of laying pieces of granite of the width of nine inches, end to end, so as to form a substitute for iron railroads, at a much less expense; and that for this invention the plaintiff had obtained a patent, and that prospectuses (which mentioned the patent) had been issued, for forming a joint stock company, to be called The National Stone-way Company. It was proved by a clerk of the solicitor to the company, that a committee was appointed, and that the plaintiff acted as secretary. It was admitted that money was advanced for the intended company, and that a balance was in the hands of the defendant, who was a banker, and that the plaintiff acted as the secretary at the meetings of *the committee, and took several journies on the business of the intended company, (of which his actual expenses had been paid out of the company's funds;) and evidence was also given of the value of his services. However, the only evidence to connect the defendant with the case as having acted in the affairs of the company, was the following resolution of the committee of the intended National Stone-way Company:

"June 6th, 1825.—Resolved, that William Fry, Esq., be added to the committee:"

And also the fact of his attending a meeting of the committee on the 23d of *June*, 1825, at which the plaintiff acted as secretary, and at which the defendant moved a resolution which appeared in the minutes of the meeting as follows:

"Adjourned sine die, the secretary being instructed to summon the committee

as soon as necessary."

F. Pollock, for the defendant. It is true that Mr. Fry has a small sum of money in his hands; but that he holds for the subscribers to the company, to whom he must pay it when they call it out of his hands. But my answer to this action is this:—The whole scheme was the plaintiff's, he being the inventor of the plan. The committee met on his suggestion, to carry his plan into effect: he has no more right to bring an action against Mr. Fry for his acting as secretary, than Mr. Fry has to bring an action against him for acting as one of his committee; and I submit to his Lordship, that if the company originated with the plaintiff, he must look to the scheme for his reward; and instead of the company calling on the plaintiff to assist them, he collected the company together.

Abbott, C. J. Where is the proof that the plaintiff was employed by the

defendant?

*Scarlett. The plaintiff is recognized by the committee as the secretary; and in the very resolution moved by the defendant, is a direction to the secretary to do an act.

ABBOTT, C. J. Will it be more than this—that the plaintiff has obtained a patent, and assembles gentlemen to sanction it, for a company could not go on without a higher sanction; and when it is determined that journies shall be

made, they pay his expenses: indeed, I was forcibly struck by Mr. Pollock's argument, that they might just as well charge him for their attendance.

Scarlett. But, my Lord, the company still exists, and is not dissolved.

ABBOTT, C. J. I consider it as never yet formed. If the gentlemen had sent for the plaintiff to assist them, it would have been different; but he is plainly the first mover and instigator of it, and I cannot say that there is any evidence that the plaintiff was employed by Mr. Fry.

Nonauit.

Scarlett, and Chitty, for the plaintiff. F. Pollock, for the defendant.

[Attornies—Baker, and Young & Vallings.]

In the ensuing Michaelmas term, Chitty moved the Court to set aside the nonsuit; but the Court refused the Rule.

*814] *SNOW et al. v. LEATHAM et al.

In an action of trover to recover bank-notes belonging to the plaintiffs, which the defendants had taken without using due caution, if it appear that the plaintiffs' porter had different securities for money to get turned into bank-notes and cash, and that he came back with the odd cash, but alleged that the notes, which were the remaining proceeds of the securities, were stolen,—it will be for the Jury to say, whether the securities were stolen from him before they were cashed, or whether the bank-notes were stolen afterwards, and when they were the property of the plaintiffs in his hands. If the latter, it is not material whether the porter purioined the bank-notes himself, or was robbed of them by thieves.

If the defendants received notice of the loss, that notice is not to be considered in point of

law as operating as a notice for all time; and unless such notice be renewed, it will be for the Jury to say, whether, if the defendants heard no more of the matter for a year or more, they might not fairly conclude that the notes had been got back.

A mistake of the date of one of the notes in such a notice (the number and amount being correctly stated) will not avail the defendants, unless they were misled by it. And it is no answer to an action of this kind, that the defendants were always in the habit of sharing notes for strangers without saking the names for those who brought of changing notes for strangers without asking the names, &c., of those who brought them, nor even that other country bankers did so,—provided the Jury are satisfied that the defendants took these notes under such circumstances as would awaken suspicion in the mind of a reasonable man acquainted with business.

TROVER for three bank-notes of 2001., 1001., and 501.

From the evidence on the part of the plaintiffs, it appeared that they were bankers in London, and that, on the evening of the 7th September, 1824, they collected their securities for money, and gave those payable east of Temple-Bar to a confidential porter, since deceased, to obtain payment of them next day. Among them was a dividend warrant for 13791. 5s. 0d.; a check on Messrs. Glyn & Co. for 2941. 7s. 9d.; and a check on Messrs. Remingtons for 501. 14s. 8d. On the morning of the 8th, it appeared that the porter came in with his coat pocket cut, and in great agitation, and said he had been robbed of all the notes he received for these three securities and others. The odd sovereigns and silver he brought with him. It was proved that the 100l. note was one of the notes paid on the dividend warrant, the 2001. note at Messrs. Glyn's, and the 501. note at Messrs. Remington's; but neither of the clerks

could recollect whether they respectively paid these notes to the porter of the plaintiffs or to any other person. On the 8th of September, hand-bills were printed, stating the numbers, dates, and amounts of these notes, (and of others stolen with them;) but in these bills the 2001. note was described as of the date of the 9th of August, 1824, whereas in fact its date was the 19th of August, 1824. On the eve of the Doneaster races in that year, which are in the month of September, it being expected that the notes would be attempted to [315] be passed there, Taunton, a Bow-street officer, called at the defendants' bank at Doncaster, and gave them one of the hand-bills; and it also appeared that one of the plaintiffs wrote a letter to the defendants on the subject in the course of that month: and it was proved, by the evidence of Mr. Henson, the plaintiffs' attorney, who traced the notes, that he called on the defendants on the 25th of October, 1825, when they stated that they received the notes in question, and had given their own notes in change for them, during the Doncaster race-week of 1825; and that, it being the race week, they did not know of whom they had received them, nor did they ask the person his name.

On this evidence it was contended, that the defendants had not only evinced a want of due caution in the manner in which they had taken the notes, but that, once having had distinct notice that they were the plaintiffs' property, the defendants must be considered as taking them with a knowledge of whose they were.

The Solicitor General contended, that the plaintiffs ought to be nonsuited. There was no evidence that these bank-notes ever were the property of the plaintiffs: because, if the dividend warrant and cheques were lost by the porter, and taken by others to the places where they were payable, these notes never belonged to the plaintiffs.

ABBOTT, C. J. I must leave it to the Jury to say, whether the porter was robbed before or after the securities were satisfied. There is the strong fact

of his bringing back the loose cash on them.

The Solicitor General went to the Jury. I do not mean to deny, that it is the duty of a person to refuse to change a note, where there is probable ground to suppose that it was unfairly come by. But if it is taken under such circumstances as not to raise a suspicion, the loss *must fall on the plaintiffs; and if the plaintiffs themselves were negligent, they cannot recover against another party who has incautiously taken the note. In September, 1824, notice of the loss was given to the defendants; but from the number of notes changed by country bankers, and the quantity of these notices, it can never be incumbent on them to look through their bundle of notices before they give a customer change for a note. If stolen notes are not recovered, it is incumbent on the losers to renew their notices from time to time. Here 2 notice was sent in 1824, with a view to the Doncaster races in that year. Now, as the notice was not renewed the next year, it led the defendants w believe that the notes had been got back: and further, the plaintiffs' own nouce was calculated to mislead, as it gave a wrong date to one of the notes. It would be proved that notes of a large amount were often changed at the larger country banks, and that it was never the practice to ask for the address of the party bringing the note. And if it were, it would be an idle question, for the party would only give a false address, which would mislead the parties, instead of being of any use. Indeed, at the Bank of England, the most ragged man in London would have notes changed to any amount, without any question, if he only wrote his name on the back of them.

For the defendants, it was proved that value was given for these notes by the defendants, and that it was the practice of their and of several other emiment country banks, not to take the address of the persons they changed notes for, nor to make any entry of the numbers, though some of them asked the

name of the bringer.

Scarlett, in reply, contended, that the mistake of the date in the notice made no difference, as the defendants were not misled by it; and as to the notice being renewed, notice once given, is, in point of law, always notice, and no

renewal could be ever required.

*Abbott, C. J. (To the Jury.) The plaintiffs allege that they were deprived of these notes without a change of property, and that the defendants took them in such a manner as not to entitle them to keep them. The law should be such as not to impede the circulation of notes on the one hand, and not to give encouragement to theft and fraud, by allowing too great a facility in disposing of stolen property, on the other. If a person take a Bank of England note, under circumstances which might awaken suspicion in the mind of a reasonable man acquainted with business, and which ought to cause him to make inquiries, and he forbear to do so, he cannot hold the proceeds of such note from the person who has lost it. In this case, you have to consider whether the stealing was after the securities were cashed and turned into money; for, if it was, whether the porter purloined the notes himself, or whether they were stolen from him by thieves, is immaterial. On the approach of the Doncaster races, in 1824, notice of the robbery was sent to the defendants, on a supposition that it was likely that the notes would be attempted to be passed there. Now it is contended, as matter of law, that notice once given is notice for all time. I do not go all that way with the learned counsel for the plaintiffs: and I think it is for you to consider whether, as men of business, the defendants would fairly advert to a notice of this kind, given a year before, or whether they might not suppose, as they heard nothing more about the matter, that the notes had been got back. As to the mistake of the date of one of the notes, that I think makes no difference, unless the defendants were misled by it. It is proved for the defendants, that they do not ask who brings the notes, nor enter numbers or dates. But the question for you to consider is, whether the defendants conducted their business in the race week in such a manner as to hold out temptation to persons unlawfully possessed of property to pass it to them—the defendants knowing that at such a time all sorts of persons, some being of the highest, and some of *the most depraved classes, were then at that place. If you think that was so, you ought to find for the plaintiffs; but if you think that there was nothing incorrect in the manner in which the defendants' bank was carried on, and that the defendants took the notes in the regular and proper course of business, you will find a verdict in their favor.

Verdict for the plaintiffs—Damages 350l.

ABBOTT, C. J. I hope that the gentlemen who carry on the business of bankers in the country will be warned by what has taken place, and conduct their business with more care in future.

Scarlett, Brougham, and Platt, for the plaintiffs.

The Solicitor General, Denman, and Parke, for the defendants.

[Attornies-Henson & D., and Leaver.]

See the cases of Beckwith v. Corrall, ante, p. 261; Snow v. Peaceck, ante, p. 215; Downs . Halling, ante, p. 11, and the cases there cited.

FUSSIL et al., Executors of DAWSON, v. BROOKES et al.

If a bond be given for the repayment of money, with interest at 51. per cent., proof that the obligee has received interest on it at 7½ per cent. will not avoid the bond, unless the jury are satisfied that it was agreed, at or before the execution of the bond, that more than 51. per cent. should be paid.

DEBT on a bond, dated May 8, 1820, in the penal sum of 1200L, to secure the repayment of 600l. and interest, at 5l. per cent., on the 8th of May, 1822. Pleas, 1st, the general issue, and, 2d, that the loan was usurious, the money

being lent at 71 per cent.

It was proved, that in July, 1823, the defendant went to Dawson, (who died in April, 1824,) and, having put down 151., which was half a year's interest at 51. per cent., said, "Now, Mr. Dawson, what have I more to pay, to make up the 71 per cent.?" To this Dawson replied, "I have had things of you to the amount of 21. 10s., and if you give me 51. more, that will be the sum;" and that the defendant did so.

*Scarlett, in reply, contended, that, as the interest was payable in May, if this further interest was paid for the forbearance till July,

though the payment would be usurious, it would not avoid the bond.

ABBOTT, C. J. To avoid the bond, it is necessary that the usurious interest should have been agreed for at or before the execution of the bond; and if the Jury are satisfied that it was so agreed for at or before the execution of the bond, there is no doubt that the bond is void; but if it was agreed for afterwards, the bond will be good, though that payment was usurious.

Verdict for the plaintiffs.

Scarlett, and Parke, for the plaintiffs. Marryat, for the defendants.

[Attornies—Adlington & Co., and Frowd & R.]

By the stat. 12 Anne, st. 2, c. 16, it is enacted, "That no person or persons whatse-ever, from and after the nine and twentieth day of September, in the year of our Lord, 1714, upon any contract, which shall be made from and after the said nine and twentieth day of upon any contract, which shall be made from and after the said line and twentieth day of September, take, directly or indirectly, for loan of any monies, wares, merchandise, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made after the time aforesaid, for payment of any principal, or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken formed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void; and that all and every person or persons whatsoever, which shall, after the time aforesaid, upon any contract to be made after the said nine and twentieth day of September, take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest of any wares, merchandize, or other thing or things whatsoever, or by any deceiful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of five pounds for the forbearing of one hundred pounds for a year, and so since that rate for a greater or lesser sum, or for a longer or shorter *term, shall forfeit [230] and lose for every such offence the treble value of the monies, wares, merchandizes, and lose for every such offence the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted."

In the case of Tate v. Wellings, 3 T. R. 538, Mr. Justice Buller lays it down, that, to

avoid a contract on the ground of usury, it must be shown that it was usurious at the time it was entered into; for, if the contract were legal at that time, no subsequent event can make it usurious. And in Nichols v. Lee. 3 Anat. 940, in debt on bond, the defendant pleaded, that, after the execution of the bond, the plaintiff took and received from the defendant more than lawful interest for the money due. This plea was held bad on demurrer, Macdonald, C. J., saying, that, to avoid a security as usurious, you must show that the agreement was illegal from its origin.

In the case of late Research v. Sould 1 Str. 498, it was laid down that in actions of

In the case of Lord Bernard v. Saul, 1 Str. 498, it was laid down, that, in actions of assumpsit, the defendant may give usury in evidence under the general issue; but that, where the plaintiff sues on a specialty, it must be pleaded. And in the case of Hill v. Montague, 2 M. & S. 377, it was held, that a plea of usury to an action of debt on boad, must particularly set forth the corrupt contract, and the usurious interest: and a plea, not stating these, was held bad on special demurrer.

M'GILLIVRAY et al., Assignees of INGLIS et al., Bankrupts, v. SIMSON.

An agreement by a broker, that he will sell goods for his principals, and pay over the proceeds, without setting off a debt due from the principals to him, is not binding.

But if he also agrees not to set off a debt due from a prior firm, which, by a previous letter, the principals had agreed to pay him, the principals having assumed the funds of that firm; the letter and the agreement must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods.

Assumpsit. The declaration, which contained several special counts, stated, that the bankrupts, together with another partner, since deceased, carried on business with one Edward Ellice, under the firm of Inglis, Ellice, & Co., and that Ellice retired from the said partnership on the 30th of April, 1821, and that the bankrupts and the now deceased partner commenced business under the firm of Inglis & Co.; that a sum of 1844l. 7s. 5d. was due to the defendant from the firm of Inglis, Ellice, & Co., and a further sum of 418l. 4s. 2d. from the firm of Inglis & Co.; and that the firm of Inglis & Co., since the death of the deceased partner, was possessed of four bills of lading, whereby a great quantity of timber was deliverable to them; and that, at the time of the making of the promise, the firm of Inglis & Co. was insolvent, of which the defendant had notice; and that, in consideration that Inglis & Co. would employ the defendant as broker to dispose of the timber, for a certain commission, and would indorse and deliver the bills of lading to him, the defendant undertook to account for and pay over the proceeds of the sale, without deducting therefrom the sums of money, or either of them, so due to him as aforesaid. The plaintiffs then averred performance, on the part of the bankrupts, before their bankruptcy, and that the timber sold for 9000l. besides the expenses and charges of the sale; but that "the defendant, not regarding, &c., did not, nor would account for and pay over the proceeds without deducting the two sums due to him as aforesaid; but, on the contrary, rendered an account, in which he deducted the whole of the said two sums; and hath refused to render any other account." Plea—General issue.

That the plaintiffs were the assignees of Inglis & Co., was admitted. And it appeared by the evidence of Mr. James Inglis, that the partnership of the house of Inglis, Ellice, & Co. was dissolved on the 30th of April, 1821, that firm then owing between 1800l. and 1900l. to the defendant; and that the firm of Inglis & Co., after the retirement of Mr. Ellice, (who is still alive,) was indebted to the defendant in about 4001. On the death of the witness's father, on the 7th of August, 1822, it was found that the house was insolvent, and the witness called the creditors together, (and among them the defendant,) and informed them of it. In the months of October and November, 1822, the bills of lading in question arrived: they were of timber, the property of the house. The defendant, who had long been the broker of the house, was asked to act as broker in the sale of them, and was told that he must not set off the debt due from either of the firms against the proceeds, but must render an account of the whole proceeds, and pay them over. To this the defendant assented. However, on his cross-examination, the witness stated that it was then *intended that there should not be a bankruptcy, but that the business should be carried on by the partners, under the inspection of trustees; and this was done from August, 1822, to May, 1823; but on the 29th of May, 1823, a commission of bankrupt was sued out. The defendant delivered

an account in the following form:—

Drs. Inglis, Ellice, & Co. in sect. with

Alexr. Simson,

Cr.

To brokerage and measuring on mahogany, £1844 7 5

£0 0 0

Drs.

Inglis & Co. in acct. with

(On this side of the account the

F322

Cr.

(Here followed a number of items, including the whole of the debt of the firm of Inglis & Co.; and the whole of these, together with the sum of 1844l. 7s. 5d., above stated, were added together as a total.)

defendant gave credit for the proceeds of the timber, and also for some other items.)

The effect of this account being to set off the debts of both firms against the

proceeds of this timber. This was the case for the plaintiffs.

ABBOTT, C. J. It strikes me, that, Mr. Ellice being still alive, the debt due from the firm of Inglis, Ellice, & Co. cannot possibly be set off. But it also appears to me, that the promise not to set off the new account is not binding.

The bankruptcy has, clearly, nothing to do with it.

Scarlett, for the defendant. I submit, that Mr. Simson is justified in what he has done. He made the promise to render the entire proceeds, when it was understood on all hands, that there was to be no bankruptcy; and that promise being made under a different set of circumstances, the assignees can only recover on the bankrupt laws, which *allow of the setting off of debts due from the bankrupts. It is said, as to the account due from Inglis, Ellice, & Co., that that is a debt due from three, which cannot be set off against a debt due to two. However, I shall show that the bankrupts wrote the defendant a letter, in these terms:-

"London, 30th April, 1821.

"We beg to acquaint you, that Mr. Ellice retires from our firm from the pre-nt date. The business of the house will be continued, as heretofore, by the remaining partners, who assume the funds and charge themselves with the liquidation of the debts of the partnership. We remain, respectfully, Sir, your most obedient servants,

"Inglis, Ellice, & Co.

"A. Simson, Esq."

Now, by this letter, in consideration of taking the funds, they also take the debts on themselves. Suppose there had been no agreement with Mr. Simson, and that, after such a circular, the new firm had put goods into the hands of the broker, could he not have set off the old debt against these goods? The creditor may not be bound by receiving this letter; but they are bound, as the writers of it. They make themselves the debtors; and I submit, that we may charge both accounts against them.

Campbell. In the very account delivered, the defendant calls this the debt

of Inglis, Ellice, & Co.

Scarlett. No doubt it was so; but Inglis & Co. having adopted it, he

charges it against them.

ABBOTT, C. J. I am of opinion, that, if the effect of that letter be such as Mr. Scarlett states, then the conversation between Mr. Inglis and the defendant must be set against it, and the parties must therefore come to their legal rights; and then the old rule prevails, that the debt *of three cannot be set off [*324 against two. The new account due from Inglis & Co., amounting to 4181. 4s. 2d., you may set off, but not the old one of Inglis, Ellice, & Co.

Verdict for the plaintiffs accordingly.

Gurney, and Campbell, for the plaintiffs. Scarlett, Marryat, and Parke, for the defendant.

In the ensuing Michaelmas Term, Gurney moved for a rule nisi for a new trial, and contended, that the defendant was not entitled to set off the debt due from either of the firms, because, in consideration of the brokerage of the timber, he agreed not to set off either of the debts; and this being a promise founded on a valuable consideration, he must be bound by it. The Court, after adverting to the cases of Eland v. Carr, 1 East, 375; Cornforth v. Rivett, 2 M. & S. 510; and Mayer v. Nias, 8 Moore, 275, and 1 Bing. 311,† refused

† In the case of Eland v. Carr, the Court held, that if, to a plea of set off, the plaintiff replies, that the goods for which the action is brought, were to be paid for in ready money, such replication is bad. In the case of Fair v. M'lver, 16 East, 130, Lord Ellenborough appears to doubt the authority of that case. However, in the case of Conforth v. Rivett, the Court held, that, in assumpsit for goods sold, the defendant might set off an acceptance of the plaintiff's, which had come into his hands after the delivery of the goods, although the defendant had agreed to pay for the goods in ready money. And in the case of Mayer v. Nias, the Court of Common Pleas recognized the authority of the case of Eland v. Cerr.

*325] *LOYD et al. v. FRESHFIELD and KAYE, Gents., Two, &c.

If money be lent to one of two partners, who says he borrows it for the firm, and he mis-apply it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover against the other partner. If money be lent to one partner on his individual credit; the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its

If a witness is called, and refreshes his memory as to the numbers of bank notes, by an entry in a book, the counsel of the opposite party may cross-examine as to the other

parts of that entry.

parts or that entry.

Deeds ought to be attested in the same room in which they are executed, and not carried away for attestation. The witnesses ought to be careful that they hear the formal words of delivery used; and it is highly expedient that the party executing should state that he fully understands what he is executing. But to make the party designate the instrument in the presence of the witnesses, as by saying "this is my power of attorney," or the like, would be laying down a rule sometimes productive of inconvenience,

The hanker of one of the parties in a cause is bound to answer what such party's balance.

The banker of one of the parties in a cause is bound to answer what such party's balance was on a given day, as it is not a privileged communication.

Money lent. Plea—General issue.

The case opened on the part of the plaintiffs was, that they, being bankers, had advanced a sum of 7000l. to Mr. Charles Kaye, one of the defendants, on the 23d of August, 1825, and a further sum of 7000l. more, on the 26th of the same month. It was opened, that these sums were advanced on the credit of the firm of Freshfield & Kaye, (the defendants,) who were solicitors to the Bank of England; and also that a great part of it had been applied in discharge of liabilities of that firm, which they must otherwise have made good, if they had not been liquidated by the money advanced by the plaintiffs, and, therefore, that the defendants' firm profited by the advance. To substantiate this, the plaintiffs' counsel stated, that Mr. Charles Kaye went to the plaintiffs' banking-house, and said to one of them that he was instructed to raise money for Mr. Legh, of Cheshire, who was a client of the firm of Freshfield & Kaye, and that a sum of 7000l. was wanted for him. This sum was advanced by the plaintiffs, on the 23d of August; but Mr. Kaye was not authorized by Mr. Legh to borrow it. nor did the money ever reach him; the way in which it was disposed of being as follows: A lady, named Fitzgerald, the daughter of Sir James Fitzgerald, had a sum of 20,000l., 3 per cent. Reduced, standing in her name, and she had given Messrs. Freshfield & Kaye a joint and several power of attorney to sell it out if they should think fit. This stock was sold out by Mr. Charles Kaye, and the firm were, therefore, liable to make it good; and it would be shown that 11,000l. of the sum advanced by the *plaintiffs was put into the hands of Mr. Easthope, a broker, for the purchasing stock to replace that of Miss Fitzgerald. With regard to 2000l. more of the money advanced by the plaintiff, it was opened that Mr. Tate, a gentleman residing in Yorkshire, who was a client of the firm, had borrowed through them a sum of 5000l. from the Albion Insurance Office; 2000l. of that sum was paid by Mr. Kaye to his credit, at his private banker's, and 17911. of the 20001. of the plaintiffs', was sent by Mr. Kaye to Mr. Tate in discharge of the liability of the firm; and 2001. more of it was paid by Mr. Charles Kaye to the bankers of the firm, Messrs. Smith, Payne, & Smith; a sum of 7000l. had been repaid to the plaintiffs by Mr. Charles Kaye; and for the other 7000l. the present action was brought. It was admitted in the opening that Mr. Freshfield was totally ignorant of the whole of the transactions above detailed, and that the way in which it was sought to fix him was, as being at that time the partner of Mr. Kaye.

On the subject of the loan of the money, a clerk of the plaintiffs' proved, that Mr. Charles Kaye called at their banking-house, and after a conference with Mr. Lewis Loyd, seven notes of 1000l. each were given to him, on his (Mr. C. Kaye's) check; and the clerk stated, that it being usual to put in their books the initials of the person to whom notes were paid, in this instance the initials C. K. were entered. He further stated, that the defendants' firm never had an account at the plaintiffs' banking-house. These notes were paid by Mr. Charles Kaye to the credit of his account, at his private banker's, (who

was not the banker of the firm.)

The evidence as to Miss Fitzgerald's stock amounted to this, that the defendant, Freshfield, and Mr. Kaye, senior, the father of Mr. Charles Kaye, had been attornies to her father; but it did not appear that she was ever a client of the firm of the defendants; and on some inquiries being made, in the year 1825, it appeared that her *stock had been all previously sold out by Mr. Charles Kaye, under a joint and several power of attorney from her to the defendants; she having stated to Mr. Harman, a bank director, that she had signed some paper, but did not know that it gave a power to sell the The stock, however, had been purchased back again into her name, through the agency of Mr. Easthope, who was employed by Mr. Charles Kaye, in his own name, Mr. Kaye using, in a letter he wrote to Mr. Easthope, the words "I," " it will be a great convenience to me," and signing his own name, and not the name of the firm. In the purchase of that stock, a considerable portion of the money advanced by the plaintiffs was applied. The power of attorney which was put in, was a joint and several power to Messrs. Freshfield of Kaye, to sell the whole or any part of the stock. The instructions for it were written by a clerk of that firm in their office, but by the direction of Mr. Charles Kaye only.

Another clerk of Messrs. Freshfield & Kaye proved that he witnessed the execution of the power of attorney by Miss Fitzgerald; he stated, that she was in a drawing-room at the office, which was not ordinarily used for the purposes of business, and which was beyond Mr. Charles Kaye's private room. He further stated, that he was called in to see her sign it, he not knowing what it was; and that after seeing her execute it, he took it into the next room to attest it, but that he heard no explanation given to her as to what it was.

ABBOTT, C. J. What did Miss Fitzgerald say ?

The witness. I don't know that she said any thing except the formal words.

ABBOTT, C. J. Without meaning to cast any imputation on the witness. I must say, that I think too little attention is paid to this matter; very soften deeds are carried *out of the house to be attested, and in some

cases it has been forgotten and omitted. In my judgment, the attestation should in all cases be made in the room where the deed is executed, and witnesses should be careful that the formal words, "I deliver this as my act and deed," are used by the party. I think it also highly expedient that the witness should hear the party say, that he understands what it is that he is doing. attention is paid to this matter; it ought to be treated with much more care than it is.

Scarlett. It occurs to me, my Lord, that it would be much more advantageous if the party said, "this is my power of attorney," or designated the

instrument he was executing.

ABBOTT, C. J. I think that that would be holding the parties too strictly, because there might be cases where binding parties to adhere to such a rule would be highly inconvenient. I have thought it right to say what I have, as it is a matter worthy of the most serious consideration of the profession.

As to the part of the plaintiff's money which was paid to Mr. Tate, it was proved that, on the 25th of August, Mr. Tate, who lived in Yorkshire, had borrowed 5000l. of the Albion Insurance Office. The firm of Freshfield & Kaye were his attorneys, and that sum was in the hands of Mr. Charles Kaye; and that 3000l. of that 5000l. he sent to Yorkshire, but paid 2000l. of it, on the same day, to his own private banker, and sent 17911. of the money advanced by the plaintiffs into Yorkshire instead; and 2001. more of the money advanced by the plaintiffs, Mr. Kaye paid into the bank of Smith, Payne & Smith, to the credit of the defendants' firm; and it appeared that Mr. Charles Kaye had not the power of drawing on the funds of the house in the hands of their bankers.

*A clerk in the house of Whitmore & Co., who were Mr. Charles *329] Kaye's private bankers, was asked what Mr. Charles Koye's balance

was at a given day.

The witness applied to the Lord Chief Justice, and said, that their orders were not to state what the balance of any customer was, except by the direction of the Judge.

Abbott, C. J. It is not a confidential communication; I think you are

bound to answer the question.

Scarlett, for the defendant, Freshfield. It is clear that the money was not lent to Mr. Charles Kaye on the credit of the firm of Freshfield & Kaye, because it was advanced on the check of Mr. Charles Kaye alone; and as to its being applied to partnership purposes, Miss Fitzgerald was never a client of the firm, and it is not even asserted that Mr. Freshfield was conusant of the transactions relative to her stock, but quite the contrary; and in directing the broker to buy it, Mr. Charles Kaye gives the order on his own sole account. As to Mr. Tate's money, that stands thus: Mr. Kaye had 50001. from the Albion for Mr. Tate, who was a client of the house. Now he keeps two of the thousand pound notes received from the Albion, and sends Mr. Tate one of the notes advanced to him (Charles Kaye) by the plaintiffs, and a part of the proceeds of another of them. That is a mere change of one note for another of equal value, and not an applying of the plaintiff's money to the purposes of the house.

ABBOTT, C. J. This case, on the part of the plaintiffs, has been put on two grounds: First, That the money was lent by the plaintiffs to the firm of Freshfield & Kaye. This ground clearly fails, for it is shown that it was advanced to Mr. Charles Kaye alone, his initials C. K. being put in the plaintiffs' books at the time the notes were given to him. The second ground on which this case is *put is, that the money was applied to partnership purposes in re-purchasing stock, which both the defendants were liable to make On the evidence, it is very doubtful whether Mr. Freshfield could have been called on to make good that stock, but on this I give no opinion. Charles Kaye alone employed the broker to buy it—he gave directions in his own

name only—and wrote a letter on the subject in his own name, and signed it "Charles Kaye," and not Freshfield & Kaye; and he does not profess to say that it is a transaction of the partnership. As to the 2000l., part of which was sent to Mr. Tate, and 200l. of the residue paid to the bankers of the firm; it appears that Charles Kaye, as a partner of the house, had received 5000l, and that instead of sending the identical five notes of 1000l. each, he takes two of those five, and the next day sends Mr. Tate instead, the proceeds of part of two of the notes advanced to him by the plaintiffs.

Alderson. My Lord, it appears that, on the 25th of August, he, as a parner of the house, gets 5000l. of Mr. Tate's money; he keeps 2000l., and, on the 26th, he gets the plaintiffs' money, and repays Mr. Tate out of that

ABBOTT, C. J. That is no more than the case of a man borrowing a ten pound note to pay his butcher, and instead of paying the butcher with that individual note, he receives some money of his partners, and pays the butcher with that.

Brougham. I would put it thus, my Lord: Charles Kaye misapplied Tate's money on the 25th, and for this the partners were liable; and, therefore, they were benefited by the money of the plaintiffs, as it discharged them from that liability.

ABBOTT, C. J. Gentlemen of the jury, you have heard *Mr. [*33]

Brougham's observation; and if you think that there was a loan of money by the plaintiffs to the partners, you will find a verdict for the plaintiffs

Verdict for the defendants.

ABBOTT, C. J. Now the cause is over, I can say, that as soon as it was proved by the plaintiffs' clerk, that the initials C. K. were entered in their book, I considered the cause at an end.

Brougham. Alderson, and Cameron, for the plaintiffs. Scarlett, and Gurney, for the defendant Freshfield.

[Attornies—Willis & Co., for the plaintiffs; Freshfield, in person; and Crowder & M., for the defendant, C. Kaye.]

BEFORE ABBOTT, C. J., AND BAYLEY, J.+

In Banc.

Brougham now moved for a rule to show cause why there should not be a new trial. He contended, that as the power of attorney was given by Miss Fitzgerald to the firm of Freshfield & Kaye, she must be considered as a client of the house, and that the money of the plaintiffs was paid in discharge of the liabilities of the firm; and further, that, as the plaintiffs lent their money on a representation that it was for Mr. Legh, who was avowedly a client of the firm, it was lent on the credit of both the defendants.

BAYLEY, J. It would stand thus: that Mr. Charles Kaye, being partner of a house, states (what is not true) that the house want to borrow money for Mr. Legh. Now, *unless you connect Mr. Freshfield with the transaction, it is not evidence against him.

Brougham. But, my Lord, to borrow money for their clients, was within

¹ Mr. Justice Holroyd was in the Bail Court, and Mr. Justice Littledele had gone to chambers.

the scope of their business as attornies. I have further to object, that there was not legal evidence of the fact that the initials "C. K." were placed against the entry of the notes in the plaintiffs' books. I called the clerk to prove the loan of the notes, and he refreshed his memory, as to the numbers, by an entry made by himself; and Mr. Scarlett cross-examined him as to the initials.

BAYLEY, J. Were not the initials "C. K." a part of the entry you exa-

mined to?

ABSOTT, C. J. Yes. And if you make one half the entry evidence, ought not the other side to have the rest of the entry, if they wish it? It would be a disgrace to the administration of justice, if half an entry could be read without the rest.

BAYLEY, J. The witness can only say, This entry is in my handwriting: I have no doubt that the numbers of the notes are right, because they are in this book. Now, if he speaks so far from the entry, he ought to give the whole of it.

Brougham. Then, my Lord, it should have been left to the Jury to contrast the entry with Charles Kaye's assuming to act for Mr. Legh, a client of the house.

BAYLEY, J. Is it a regular mode of doing business to lend 7000l. without any security but such a check as this, and without any voucher from the client?

Brougham. We also submit, that, if this money was borrowed by Charles

*2321 Kaye alone, and was applied in *discharge of the liabilities of the firm.

both partners are liable.

ABBOTT, C. J. Taking the evidence together, it appeared to me, that the advance was to Charles Kaye alone, and not to Freshfield & Kaye. As to any rule, that if one partner borrows money on his separate credit, he, by applying it to partnership purposes, thereby makes the house liable; I wish it to be distinctly understood, that I do not subscribe to that doctrine. I considered, that these were private transactions of Charles Kaye, in fraud of his partner.

BAYLEY, J. It seems to me, that there is no ground for disturbing this verdict. In point of law, one of several partners may pledge the partnership name for money bona fide lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purposes of the house. But if there be gross negligence, and the transaction be out of the ordinary course of business, the lenders cannot recover against the other partners, if the money be misapplied. The plaintiffs lend to Charles Kaye alone: the sum is very large; and there is no document, not even a letter from Mr. Legh, stating that he wants any money; and no deed passes. Now, is this a loan that a man would be expected to make? If a man lend where no prudent man ought, he is himself answerable if there be any thing wrong. It is said that 1800l. and 2001. went into the joint funds of Freshfield & Kaye, over which Charles Kaye had no control. But I answer, that it is not sufficient to show, that the money was applied to the purposes of the house, unless the firm had fair ground to presume that it was properly borrowed for them; if this were enough, you would enable one partner to defraud the others. There were 5000l. to be sent to Mr. Tate, from the Albion. If Mr. Kaye had not obtained this loan *334] from the plaintiffs, Freshfield would have found *that 1800l. were misapplied: that would have drawn his attention to the matter. But by this loan he is lulled into security, and supposes all to be regular. If Messrs. Loyd & Co. lend money irregularly, they cannot sue Mr. Freshfield if it be misapplied. It was a negligent act, at least, in the plaintiffs to lend it; and they therefore cannot call on an innocent party for its repayment.

Rule refused.

THOMPSON et al. v. TRAIL et al.

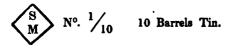
Where the master of a ship gives a receipt for goods put on board, it behoves him not to sign a bill of lading till that receipt is given up.

If such a receipt is in the hands of the consignor, who, after the failure of the consignee, demands the goods, and the Captain refuse to deliver them, assigning as his reason, that he has signed a bill of lading to the consignee, this is a conversion; although the consignor did not tender either the freight or a compensation for the trouble of leading. And the fact, that one of the consignors said to one of the consignees, after the failure, that he was sorry for it, but would do as the other creditors did, will not make it less a conversion, if that conversation was unknown to the Captain. However, if the Captain, instead of assigning the reason he did for the non-delivery, had said, "the goods are now on board, and I must take them to their destination," that would have been no conversion. The fact, that the ship is named by the consignee, makes no difference as to a stoppage in transitu.

TROVER for ten barrels of bar tin. Plea-General issue.

The plaintiffs were lead and tin merchants, and the defendants the owners and master of the ship George and Mary. It was proved, on the part of the plaintiffs, that, on the 23d of Junuary, 1826, the plaintiffs received an order from Messrs. May, Aylwin, & Co., of St. Mary-axe, London, for the tin in question, to be shipped on board the George and Mary, for Leghorn. The goods were shipped on the 24th, and the plaintiffs took the following receipt from the mate:

"Received on board the George and Mary, Captain Brown, for Leghorn, from Thompson, Farnworth & Co., Dowgate Iron Wharf,



"Jan. 24, 1826.

"John Swan, Mate."

*This receipt the plaintiffs kept in their own possession; and it was proved, that May, Aylwin, & Co. stopped payment on the 4th of February; and that, on the 6th, a clerk of the plaintiffs went on board the George and Mary, and, producing this receipt, demanded of the Captain that the goods should be delivered back. The Captain refused to deliver them, say-

ing, that he had signed a bill of lading to May, Aylwin, & Co.

Campbell, for the defendants. I submit, that this is no conversion. goods were shipped for Leghorn, and in the hold, the ship being ready to sail. The goods are not delivered to the plaintiffs, it is true; but the goods were part of a general cargo, and no tender was made, either of the amount of the freight, or of any compensation for the trouble occasioned. The plaintiffs had no right to have them delivered up; and your Lordship cannot possibly hold this to be a conversion, unless the owner of goods on board a ship has a right, at any time before her sailing, to have the goods delivered up to him, without any offer of compensation.

ABBOTT, C. J. That alone would not be a conversion; but the Captain says, he has signed a bill of lading. If the Captain says, "I won't deliver the goods to you, but will deliver them to A., B., or C.," that is a conversion.

Campbell, to the Jury. The receipt given to the plaintiffs is not in the form of those in the cases relied on. They were "shipped on account" of the sellers; here, the receipt is merely "from" the sellers; leaving it doubtful on whose account they were shipped. Here, not only were the goods invoiced to May, Aylwin, & Co., but the ship was named by them in the order.

Abbort, C. J. The ship's being named by the buyer makes no difference

as to a stoppage in transitu.

*Evidence was given, on the part of the defendants, that Mr. Farnworth, one of the plaintiffs, saw Mr. May on the same day that May, Aylwin, & Co. stopped payment; and that, after expressing his regret at their failure, Mr. Farnworth said, that they should be willing to do as the other creditors did.

ABBOTT, C. J. It has been decided, that where a receipt is given for goods put on board a ship, it behoves the Master not to sign a bill of lading till that receipt is given up; and it is highly convenient that the law should be so: if it were not so, it would be in the power of the Master of the ship to elect which party should have the goods. In one case it was held, that the circumstance of the seller's name being omitted in the receipt, made no difference. As to the conversation between Mr. Farnworth and Mr. May, I don't see how that can affect the defendants; because the defendants were strangers, and could not have been influenced by it. If the Captain had been apprised of that conversation, at the time of his signing the bill of lading, it would have been most important.

One of the Special Jury. Is it your Lordship's opinion, that, when the

goods were demanded, the Captain was obliged to give them up?

ABBOTT, C. J. If the Captain had said, when the goods were demanded, "I cannot give them up: they are on board, and I must take them to Leghorn;" I should have held, that that was no conversion; but instead of that, the Captain says he has signed a bill of lading: and a refusal on that ground, is, in my judgment, a conversion.

Verdict for the plaintiffs.—Damages, 1801.

Scarlett, and Comyn, for the plaintiffs.

Campbell, for the defendants.

[Attornies—Vanderoom & Comyn, and Swain & Co.]

*In the ensuing Michaelmas Term, Campbell moved to set aside the verdict, but the Court refused the rule.

In the case of Craven v. Ryder, 6 Taunt. 433, where the receipt was, "Received on board the George, for Hamburgh, for and on account of" (the plaintiffs, &c.,) Lord C. J. Gibbs lays down, that "the practice is, that the person who is in possession of the lighterman's receipt is the person entitled to the bill of lading, which ought to be given only to the holder of that receipt; consequently, the holder of that receipt retains a control over the goods, at least, until he has exchanged the receipt for the bill of lading." And in the case of Buck v. Hatfeld, 5 B. & A. 632, where goods were sold free on board, and, upon their shimment, the agent of the consignors tendered a receipt, which the Mate (in the case of Buck v. Haireta, 5 B. & A. 632, where goods were sold free on board, and, upon their shipment, the agent of the consignors tendered a receipt, which the Mate (in the Captain's absence) refused to sign, and next day signed bills of lading to the consignees; it was held, that the consignors had a right to stop in transitue, on the insolvency of the vendees. And Abbott, C. J., observed, that it was important for the plaintiff to have the receipt; for, so long as he retained possession of it, he was enabled to interpose a delay on the delivery of the goods.

ADJOURNED SITTINGS AT WESTMINSTER, AFTER TRINITY TERM, 1826.

BOWRING et al. v. STEVENS.

If the declaration state that the defendant falsely represented that in his public house "his returns had averaged, and then averaged 300% a month." This allegation is proved by evidence that he said he was "doing 300% a month in the house." the fact, that he named his brewer, and kept a pass-book of his beer and spirits, and that the plaintiffs neither inquired of the brewer, nor asked for the pass-book, do not go in bar of the action, but are fit matter for the consideration of the jury, on the question, whether the defendant practised a fraud and deceit on the plaintiff. When it is objected, that an agreement which bears a 1% stamp, is inadmissible, because it contains more than one thousand and eighty words, the coansel making the objection must be prepared with a witness, who can prove that he has counted the words, and can positively state their number. The receipt for the penalty put on an agreement at the stamp-office, when it is stamped there, on payment of the penalty, is not to be reckoned in counting whether the agreement, "with every receipt, &c., indorsed thereon," contains one thousand and eighty words, although the agreement cannot be read unless such receipt for the penalty is indorsed on it.

CASE.—The first count in the declaration stated, that the defendant carried on the trade of a publican, at a certain messuage called the King and Queen, situate in Duke Street; and that the plaintiff had agreed to purchase the lease of the house, and goodwill of the trade, at 2350l.; and *that the defendant, at the time of that bargain, falsely represented that the said house "was doing 150l. per month in Foreign and British spirits, and selling from twelve to thirteen butts of beer per month of Whitbread's, and in all was doing 200l. per month;" and that the plaintiff in consequence purchased and paid for, &c. The count then proceeded to aver the representations to be false. The second count stated, that the representation by the defendant was, "that his returns in his said trade and business as a publican, had averaged, and then averaged, 300l. per month." The third count stated a representation, that "he received from the sale of Foreign and British spirits, compounds, and wine, 200l. per month." Plea—General issue.

It was proved, that during the negotiations for the purchase of the house, the defendant was asked as to the extent of his trade, and he stated that he did about 200l. a month in spirits and wine, and 300l. a month altogether; and he stated that Whitbread was his brewer. It appeared, that persons who keep public houses have pass-books, in which the beer and spirits are entered as they receive them: but the persons who made these inquiries for the plaintiffs, did not ask for a sight of the pass-books, nor did they inquire at Messrs. Whitbread's what beer they had sold to the defendant. The agreement, as

stated in the declaration, was put in.

J. Williams, for the defendant, objected, that it was not properly stamped. By the stamp-act, 55 Geo. 3, c. 184, every agreement, "together with every schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, where the same shall not contain more than one thousand and eighty words, being the amount of fifteen common law folios or sheets, of seventy-two words each," is to be stamped with a 11. stamp; and if there be a greater number of words, 11. 15s. Now this agreement, together with a receipt on the back of it, contained more than one thousand and eighty words.

ABBOTT, C. J. It is a general rule, that where an *objection of this sort is made, the party must be prepared to prove the fact. We never wait on such objections as this. Have you a witness now ready to prove that

he has counted the words, and who can tell us on his oath what the number is?

J. Williams. He has counted the words of the agreement, but not of the receipt; because we have no copy of it.

ABBOTT, C. J. I will allow to count the words of the receipt now.

The defendant's counsel then called a witness, who proved that the duplicate of the agreement, which was in the defendant's hands, contained fourteen folios and thirty-seven words more. He counted the words in the receipt, which were forty-eight, which brought it to thirteen words over fifteen folios.

When the receipt came to be looked at, it was the receipt for the penalty paid at the stamp-office for stamping the agreement, it having been originally

without a stamp.

Abbott, C. J. That receipt must not be counted in.

J. Williams. But, my Lord, the agreement cannot be read without it.

ABBOTT, C. J. It is no part of the agreement.

The agreement was read, and evidence was given to show that the business of the house was much less than the defendant had asserted.

J. Williams objected, that none of the counts were proved. As to the representation in the first count, the witness, who was to prove that, qualified the "340] representation *by the introduction of the important word "about," instead of proving a positive representation of 2001. a month. The second count stated that the business had averaged, and then averaged, 3001. a month. Now, in the evidence, the defendant merely asserts that of the then present time, but says not a word about averaging; and there is no evidence at all applicable to the third count.

Scarlett, contra. This is said to be matter of variance: but this not being a contract, it is sufficient if we prove enough of our declaration to sustain a case of fraud. As to the first count, it is said, that the word "about" occurs; but it must be taken, that the defendant did not mean to represent the exact quantity of business he was doing; so that if he said that he was doing 150% a month, and he proved that he sometimes did 149%, and sometimes 151%, that would be proof of his assertion, considering what that assertion fairly imported. As to the second count, the question is, whether, if a man says, I am doing business to the extent of 300% a month, it does not mean that his business averages that. If so, the allegation and the evidence are substantially the same.

ABBOTT, C. J. I doubt whether the first count is proved; but I take it, that the defendant's statement denotes that his business averaged 300l. a month.

The defendant's counsel then contended, that as the plaintiff neglected to obtain all the information they might have procured, and omitted to inquire at Messrs. Whitbread's, and to call for the pass-books, they could not maintain an action for the false representation, it being laid down by a very able lawyer, that, "if the party had the full means of detecting the fraud, and ascertaining the truth, and neglected to inform himself of it when he might easily have done so, it seems that an action for deceit cannot *be supported, and vigilantibus non dormientibus jura subveniunt." 2 Stark. Ev. 471.

ABBOTT, C. J. The question here is, whether, on the whole of the evidence, the jury are satisfied that the defendant practised a fraud and deceit on the plaintiffs; and in forming their judgment on that question, the jury ought to take into their consideration the facts, that the plaintiffs might have asked for the pass-books, and have inquired at the brewer's; and they should also make reasonable allowance for the sort of representations a man always makes, when he is going to sell any kind of property.

Verdict for the plaintiff.—Damages, 2001.

Scarlett, Gurney, and Lee, for the plaintiffs.

J. Williams, for the defendant.

In the ensuing Michaelmas Term, a new trial was applied for, but the Court refused the rule.

BRATHWAITE v. CHURCHILL.

If the defendant has said that he cannot pay a debt, but will give a bill for it, and the amount be not mentioned, but the defendant speak of having been arrested for it; proof of this admission will entitle the plaintiff to a verdict for 101., as the defendant could not have been arrested for a less sum.

Assumpsit for goods sold. Plea-General issue.

This was an undefended cause, and the plaintiff claimed 251.

A witness stated, that he called on the defendant, who said that he could not pay the debt, but would give a bill for it. The amount of the debt was not mentioned; but the defendant spoke of having been arrested for it.

ABBOTT, C. J. What the amount of the debt was, is *left wholly uncertain in this evidence; but as he could not be arrested for less than 10l., I think that this may be sufficient to entitle the plaintiff to a verdict for that sum.

Verdict for the plaintiff.—Damages, 10l.

Rowe, for the plaintiff.

[Attornies-Shoubridge, and Moore.]

See the case of Dixon v. Deveridge, ante, p. 109. Nothing is more indiscreet in cases of goods sold, or work and labor, which are expected to be undefended, than to trust to proof of a supposed admission of the debt to a witness, instead of proving the delivery and price of the goods in the one case, and the doing of the work and its value in the other; because it so often happens, that the witness who is to prove the admission says, that ne amount was mentioned; and thus it is not uncommon for the plaintiff either to be non-suited, or obliged to take a verdict for much less than his demand; in cases where he coeffd have easily made out his full claim, if one or two other witnesses, who were not subposnaed under the mistaken notion of economy, had been in attendance.

BOND v. RUST et al.

If, in an action for false imprisonment, two of the defendants are acquitted, because they were constables, and the veruse was not laid in the proper county, another defendant is not entitled to be acquitted as acting in their aid, if in his plea he state, that he. "se owner of a certain house, and the other defendants, as constables, acting in his sid, took the plaintiff, &c."

Assault and false imprisonment. Pleas—1st. The general issue; and 2d. That the plaintiff was making a disturbance and doing wilful damage in the house of the defendant Rust; and that he, as owner of the said house, and the other two defendants as constables acting in his aid, took the plaintiff to a watch-house, as they lawfully might.† Replication—De injuria.

[†] This justification was framed on the stat. 1 Geo. 4, c. 56, commonly called the malicious trespass act.

From the evidence it appeared, that the defendant Rust was the owner of a house in Charlotte Street, Blackfriars Road, in the county of Surry; and that the plaintiff and other workmen were taking down a room of the house, by the consent of a person who had been Rust's tenant; and *that the three defendants took the plaintiff to a watch-house, where he was detained all night, but was discharged by the magistrate next day.

ABBOTT, C. J. As the whole of this occurred in Surry, the constables must

be acquitted.†

Gurney, for the defendants. I submit that Rust is also protected, because

he was acting in their aid.

ABBOTT, C. J. The plea states, that they were acting in his aid, and not he in their's; and he is, therefore, not entitled to that protection.

A verdict was taken for the plaintiff as against Rust, subject to the opinion of the Court above, on the question, whether the defendant Rust could justify what he had done, under the stat. 1 Geo. 4, c. 56. The constables were acquitted.

Denman, and E. Lawes, for the plaintiff Gurney, and Chitty, for the defendants.

[Attornies-Richings, and Meymott.]

† See the stat. 21 Jac. 1, c. 12, s. 5, and aute, Vol. 1, p. 41, n. (a.)

RAGGETT v. BISHOP.

The master of a club-house is the proper person to sue one of its members for the arrears of his subscriptions; and if by one of its rules, every member is to be taken as continuing so, unless he give previous notice of his intention to discontinue being a member, he is liable to be sued for his arrears of subscriptions, unless he can prove that he gave such notice.

ASSUMPSIT to recover 10l. 10s., being the amount of one year's subscription, alleged to be due from the defendant as a member of the *Cocoa-tree Club*, in St. James' Street, for the year 1824.

It appeared from the evidence, that the plaintiff was master of that club, and that the defendant became a member in the year 1823, the subscription being ten guineas a year. By the rules of the club, (which were put in,) it appeared that the subscription was to be paid every year, on the 1st of January; and that if no notice were given by members of their intention to discontinue, they were to be considered as members. By one of these rules, the master was empowered to collect the "house bills."

Scarlett, for the defendant. I submit that the plaintiff is not the proper person to sue. The master of a club is merely the agent of that club, who have their general meetings, and make regulations independent of the master.

ABSOTT, C. J. I think that as the plaintiff is the master of the house, every member must be considered as a debtor to him for his arrears. The members may take upon them the management of the affairs of the club; but I think they are bound to pay the master; and if so, the defendant is liable in this action, unless he can show that in the year 1823, he gave notice of his intention to discontinue his subscription after that year.

Verdict for the plaintiff.—Damages, 101. 10s.

Gurney, and Chitty, for the plaintiff. Scarlett, for the defendant.

[Attornies-Fisher & S., and Johnstone.]

WILKINS, Assignee of KEEN, an Insolvent, v. FORD.

An insolvent debtor is not a competent witness for the plaintiff in an action by his assigned to recover a sum due for work done by him before his insolvency.

Assumestr for work and labor done by the insolvent before his insolvency Plea—General issue; with a notice of set off.

The plaintiff's title, as assignee, was made out, and the insolvent was called to prove the work done. On the voire dire he stated, that his estate would not pay 20s. in the pound.

*Abraham, for the defendant. I submit that he is not a competent witness. This is not like the case of a certificated bankrupt; because, till 20s. in the pound are paid, an insolvent's future effects are liable.

ABBOTT, C. J. Certainly, and the more that is paid by the effects that are assigned under the insolvency, the less will be to be paid by him afterwards, out of his future effects; therefore, by increasing the verdict to-day, he decreases his own future liability. I think he is not a competent witness.

The case was made out by other evidence.

Verdict for the plaintiff.

Gurney, and Andrews, for the plaintiff. Abraham, for the defendant.

[Attornics-Platts, and Stephens.]

BARNES v. WINKLER.

A Court for the recovery of debts under 40s., may give judgment for the plaintiff, although it appears that the debt was above 40s., if the plaintiff will waive so much of his debt so will bring his claim under 40s., provided there be nothing in the act of Parliament constituting that Court which prevents his so doing. The judgment of a Court for the recovery of debts under 40s. is not conclusive. But proof that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits is proper for the consideration of the Jury.

Assumpsir' for board and lodging furnished to the defendant's wife up to the month of October, 1824. Plea—General issue.

For the plaintiff, a promise to pay 21. 12s. was relied on.

The defence was, that on the 23d of September, 1824, the plaintiff summoned the defendant to the Middlesex County Court, for the board and lodging up to that time; and that the case, after being fully heard, was dismissed on merits.

To prove this, a clerk from the County Court produced *the book kept at that Court, in which he made minutes of the cases as they were

disposed of: he stated, that this case was dismissed on merits; and that although that Court could only take cognizance of debts under 40s., the case would not be dismissed, because the debt appeared to be greater in amount than 40s., provided that the plaintiff consented to waive enough of his debt to bring it under 40s.

ABBOTT, C. J., (in summing up.) If a man dismiss his wife without reason, and any one supply her with necessaries, the husband must pay for them; and so he must if they are supplied by his consent; but if the wife goes away of her own accord, the husband is not liable. The plaintiff here relies on the husband's consent. Now the defence in this case is, that the plaintiff sued on his claim for this very board and lodging, which is the subject of the present action, in the County Court, and that his complaint was dismissed. been told, that if the debt be of a greater amount than that Court can take cognizance of, the plaintiff has judgment in his favor, if he waives enough to bring it under 21.; and in point of law, if a debt of 21. and more is due, and the plaintiff consents to waive it, and to claim only 11. 19s. 6d., and wishes to resort to a cheap tribunal for the recovery of it, I see no reason why he may not do so, provided there be nothing in the Act of Parliament constituting that Court which prevents him. The judgment of the County Court is in this case not conclusive; but it is fit matter for consideration in estimating whether the wife of the defendant was at the house of the plaintiff by the assent of her husband, because, something might have occurred at the County Court, to show that the plaintiff took her on his own responsibility.

Verdict for the plaintiff.—Damages, 21. 12s.

Andrews, for the plaintiff. Gurney, for the defendant.

[Attornies—Platts, and Harmer.]

*347] *Courts of Requests are established by different acts of Parliament in various parts of the kingdom. And if, in a case within their jurisdiction, a plaintiff sues in the superior Courts, he is put under great disadvantages, such as paying double costs, &c. These Courts have jurisdiction in a great many large towns, and also in many cases over hundreds, wapentakes, parishes, &c. They are much too numerous to be enumerated in this note; but the places in which they have jurisdiction, and the extent of the powers of each, with all other necessary information, will be found in Mr. Pratt's work on Courts of Requests; some of them have only jurisdiction to the amount of 40s., many more extend to 51.; among which are those of London and Southwark. That of Batk (which also includes the parish of Walcot, and a great deal of the surrounding neighborhood) extends to 101.; and this, and several others, not only have cognizance over cases of debt, but also of trover, detinue, trespass in taking goods, rent, bills of exchange and promissory notes, and bonds for the payment of money.

promissory notes, and bonds for the payment of money.

The cases on the subject of costs, where actions have been brought in the superior Courts, where the subject matter was within the jurisdiction of a Court of Requests, will

be found in 2 Arch. K. B. Pr. 294.

As to actions brought in England, where the cause of action arose in Wales, see Moore v. Williams, ante, Vol. 1, 468.

APPLETON v. C .APBELL.

If a party lets lodgings to an immodest woman, to enable her to consort with the other sex, he cannot recover in an action for the lodging so supplied; but if the woman merely lodges there, and receives her visitors elsewhere, he may.

Assumpsir for board and lodging. The defence was, that the defendant was an immodest woman, and used the lodgings for the purposes of prostitution, to the knowledge of the plaintiff.

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To substantiate this, another female, who lodged in the house, and who was called for the plaintiff, proved, on her cross-examination, that the defendant was in the habit of receiving male visiters, and that the plaintiff used sometimes to open the door for them; and that the plaintiff told her, that the defendant was an immodest woman.

ABBOTT, C. J. If a person lets a lodging to a woman, to enable her to consort with the other sex, and for the purposes of prostitution, he cannot recover for the lodging so supplied. But if the defendant had her lodgings there, and received her visiters elsewhere, the plaintiff may recover, although she be a woman of the town, because persons of that description must have a place to lay their heads; but if this place was used for immoral purposes, the plaintiff cannot recover.

Verdict for the defendant.

Gurney, and Abraham, for the plaintiff. Scarlett, for the defendant.

[Attornies—G. Williams, and Carlon & H.]

See the case of Born v. Bennett, 1 Camp. 246, and the cases there cited.

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER, IN TRINITY TERM, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

DOE, on the Demise of SCOTT, v. MILLER.

In an action of ejectment, the plaintiff must be nonsuited, if it be proved that a notice to quit at the end of six months was given by the lessor of the plaintiff to the occupier of the premises a short time before the bringing of the action.

EJECTMENT to recover possession of certain premises at Westminster, for

the breach of the covenants to pay rent and repair.

On the part of the defendant, it was proved, that a short time before the action was brought, a notice, dated the 21st of *December*, 1825, was given by the lessor of the plaintiff to the defendant, requiring her to quit and deliver up the premises on or before *Midsummer-day*, 1826, describing them in these terms, "which you now hold of me as tenant from year to year."

Vaughan, Serjt., submitted, that this notice could have no operation to defeat the action, as the party might not, *at the time when it was given, have [*349]

discovered the state of the premises.

Adams, Serjt., contended, that, pending the notice, the action was not maintainable, inasmuch as it was a waiver of the forfeiture, and a continuation of the tenancy. He cited Doe v. Allan, 3 Taunt. 78, where it is said, that the receipt of rent is such an affirmation of a tenancy, as to prevent the bringing ejectment for a precedent forfeiture.

BEST, C. J. The giving a notice to quit is similar to the receipt of rent.

Otherwise, a man might be at liberty to say to his tenant, "you may stay in for six months," and then immediately after bring an ejectment against him This is my opinion, in the absence of any authority which decides the point I think the plaintiff, under the circumstances, must be called.

Nonsuit, with leave to move.†

Vaughan, Serjt., and Steer, for the plaintiff Adams, Serjt., for the defendant.

[Attornies—Young, S. & E., and Brill.]

No motion was made.

*SECOND SITTINGS AT GUILDHALL IN TRINITY TERM. 1826.

PRATT v. WILLEY.

If an agent employed to sell coals, make a bargain in his own name with a tradesman to furnish him with coals on credit, for which, in return, he is to receive goods on credit, and the coals and the goods be both delivered, the real seller of the coals may recover the price of the tradesman, if his name be in the ticket sent with the coals as the seller, because the tradesman after that is bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal.

Assumperr for goods sold.

A man named Surtees, being authorised to sell coals as the agent of the plaintiff, went to the defendant, who was a tailor, and in his own name made a bargain to furnish the defendant with coals on credit, for which the defendant was to furnish him with clothes also on credit. At one time, when he called, he gave to the defendant's wife a card, on which was written "Surtees, Coalmerchant," &c. When the coals were delivered, there was in the tickets sent with them the name of Pratt, as the seller. The defendant had delivered clothes to Surtees in performance of his part of the bargain.

For the defendant, it was contended, that the plaintiff had no right to sue him for the coals, as the bargain had been made with Surtees as a principal, without any knowledge of his being the plaintiff's agent, and therefore that the price of the clothes might be set off against that of the coals. The case of

George v. Clagett was cited.†

BEST, C. J., was of opinion, that, as the name of the plaintiff was in the tickets as the seller of the coals, the defendant ought to have made inquiry into the nature of the situation of Surtees, and should not, after that, have *dealt with him as a principal. His Lordship left the question to the jury, who found a

Verdict for the plaintiff.

† 7 T. R. 359. The point decided in that case was, that "If a factor, who sells under a del credere commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal."

Wilde, Serjt., and Crowder, for the plaintiff.
Vaughon, Serjt., and Patteson, for the defendant.

[Attornies-Brutton, and Wright.]

WARE v. JUDA.

An allegation in a declaration, that the plaintiff lent a horse, is supported by evidence, that what he lent was a mare. In an action for injury to a horse, proof that the defendant, on being charged with driving it from London to Chatham, instead of to Dartferd, according to his undertaking, stated, that, in fact, he only drove to Dartferd, is sufficient to support an allegation that the contract was to drive only to Dartferd; and it is not necessary to offer distinct evidence of what took place at the time when the agreement was made. In such an ection, if it appear that the animal was the property of he plaintiff, but let by a stable-keeper to the defendant for a pecuniary recompense, the judge at the trial will not call upon the plaintiff to show that he was authorised to let horse for hire, if the defendant does not produce any statute or other authority making regulations on the subject. Nor, in the absence of such authority, will he reserve the point.

THE first count in the declaration stated, that in consideration that the plaintiff would lend and deliver to the plaintiff a certain horse of his, to be driven, harnessed to a chaise, from Dorset Crescent to Dartford, and back again; the defendant undertook that he would not perform another and different journey, and that he would drive and use the horse in a moderate, careful, and proper manner. It then averred, that the plaintiff did lend the horse, but that the defendant, not regarding his promise, went from Dorset Crescent to Chalham, and back again; and that he so immoderately, violently, carelessly and improperly drove the horse, that its knees and head were much cut and injured; in consequence of which the plaintiff was deprived of the use of it for the space of ten weeks, and had to pay a certain sum of money for its cure, and was ultimately forced to sell it for a less price than it would have fetched if the defendant had not so acted. There were other counts, omitting different parts of the special matter, and one stating generally that the defendant's promise was, that "he would take due and proper care" of the horse. Plea-Non assumpsit.

The witnesses in their evidence spoke of the animal as *a mare. [*353] The only evidence on the part of the plaintiff of the terms of the contract was, that the defendant, in a conversation with the plaintiff subsequent to the injury, said, that he had not driven the mare all the way to Chatham, but only to Dartford, and that he had hired another to go from Dartford to Chatham.

Vaughan, Serjt., upon this made two objections: First, that the term horse used in the declaration was incorrect, it appearing from the evidence that a mare was the thing lent; and, Secondly, that the evidence given of the terms of the contract was not sufficient to support the allegation of it.

BEST, C. J., was of opinion that neither of the objections was tenable.

Vaughan, Serjt., then called a witness, who stated that he went with the defendant to the livery stables of a man named Tay, and that the defendant agreed with Tay for the mare in question, to go to Dartford, for 15s. for the day. Upon this, he submitted, that the plaintiff was bound to show that he was licensed to let horses.

Best, C. J. I think not; show me some statute upon the subject. Vaughan, Serjt. Will your Lordship reserve the point?

BEST, C. J. Certainly not. You have not made me doubt. If your client wishes me to give him an opinion on the revenue laws, he must lay some authority before me.

There was conflicting evidence as to the cause of the injury.

The jury found for the plaintiff.

*353] *Taddy, Serjt., and Payne, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies—Watson & Son, and Isaacs.]

MATTHIAS v. MESNARD.

Jorn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent, as if it were deposited in a warehouse belonging to the factor himself.

TROVER for corn. The plaintiff was a corn-merchant, residing in Wales, and the defendant landlord of premises occupied by Messrs. Ryland & Knight, lighterman and granary-keepers to Messrs Ryland & Son, who were the plaintiff's factors in England. Messrs. Ryland & Son had no warehouses of their own, but deposited the corn sent them by the plaintiff for sale, in the warehouses of Messrs. Ryland & Knight. In the month of January, 1826, rent being due from Messrs. Ryland & Knight, the defendant put in a distress, and took some corn of the plaintiff's, which happened to be lying on their premises. To recover this corn, the present action was brought.

Wilde, Serjt., for the plaintiff, contended, that corn placed in a public ware-house for the purpose of being sold, was not liable to be taken under a distress for rent; because warehouses would be injured if they could not afford pro-

tection to the goods of third persons, which were deposited in them.

Taddy, for the defendant, denied that the action was maintainable. The indulgence of a factor has been extended to a wharfinger, but not to a warehouse-keeper. The cases determined have been of this nature. The first was the case of a wharfinger, on whose wharf goods are of necessity placed for importation or exportation; and it is on the ground of necessity that goods so placed are protected. The other was the case of *goods in the factor's own warehouse; but in the present case we are carried a step farther.

Best, C. J. Look at what is quoted in the case of Thomson v. Mashita, 8 Moore, 260, from Lord Holt's opinion in the case of Gisbourn v. Hurst, where he says, "that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent;" and where his Lordship also alludes to a case of Rede v. Burley, Cro. Eliz. 596, where two tradesman brought their wool to a neighbor's barn, which he kept for his private use, and it was held that it could not be distrained. I am of opinion, that there is no substantial difference between the case of a factor's warehouse and the warehouse of another which the factor

Taddy, Serjt. The plaintiff should have known that his factors had no warehouse, and should have placed his corn with some person who had one. This case is not founded on the necessity of trade. It is not necessary to employ a factor, who is to employ a warehouse-keeper under him.

BEST, C. J. If the cases referred to had decided the insulated points of a factor's and a wharfinger's protection, I should have paused in my determination now. But the judges in those cases only confirmed the general principle. A landlord has by the general law a right to take any property found upon the premises of his tenant. But many years ago, in favor of trade, exceptions were made, as in the case of the delivery of cloth to a tailor, and in many other cases. A landlord must know that he cannot take the corn of other parties; and therefore, if his tenants are *granary-keepers, he can take other security for his rent. What foreigner or what person living in the country would send articles to a granary-keeper, if they were to be put in danger in this way. It seems to me, that I should be breaking in upon a principle almost essential to the existence of trade, if I were to hold that this plaintiff is not entitled to recover.

Verdict for the plaintiff.

Wilde, Serjt., and Jeremy, for the plaintiff. Taddy, Serjt., and Carter, for the defendant.

[Attornies-Allen, and Parker & Sons.]

TOWNE v. CROWDER, Esq., et al., Sheriffs of Middlesex.

In an action for a false return of mulla bona to a f. fa., if the plaintiff show the debtor to be possessed of certain goods, it is no defence for the sheriff to show a prior execution to an amount of greater value, if to that execution the sheriff also returned mulls bons. Nor, if the sheriff has the proceeds of the goods in his hands, is it any defence to show that the f. fa., on the return of which the action is brought, was delivered at the sheriff's office at a quarter past 5 o'clock on the day on which it is returnable.

CASE against the defendants as Sheriffs of Middlesex, for a false return to a writ of fieri facias, sued out against Thomas George Western, at the suit of the plaintiff, indorsed, to levy 3791. 16s. 6d., besides, &c. The first count of the declaration stated, that the sheriff levied to the amount, and falsely returned nulla bona; and the second, that he could and might have levied, but that he

neglected to do so. Plea-General issue.

It appeared, that a sum of 309/. was in the hands of Mr. Henchman, of the Sheriff of Middlesex's office, that sum having been paid into his hands by 2 person named Langdon. Some time after, a bill of sale had been executed by the sheriff to a person named Crook, of the goods taken by the sheriff under an execution against Western, at the suit of Mrs. Stone. The bill of sale was dated on the 10th of March, 1825. It also appeared, that Western lived in a large house in New Ormand Street, and used the goods included in that bill of sale: and that a considerable quantity of them were, by the direction of Western, removed off the premises in New Ormond Street, about the 22d of January, 1826. On the 23d of January, a writ of *fieri facias was sued out against Western, at the suit of persons named Machin and Debenham, to levy 414l. 14s. 8d., and the present plaintiff was their attorney in that case. To that execution, the sheriff returned nulla bona; on which an action for a false return had been commenced, but had not been brought to trial. It also appeared, that the writ of fieri facias in the action of Towne v. Western, (on the return of which the present action was brought,) was delivered at the sheriff's office on the 13th of February, at a quarter past 5 o'clock, and was returnable in eight days of the Purification, (the same day.) To this there

was also a return of nulla bona, which was now alleged by the plaintiff to be false.

Vaughan, Serjt., for the defendants. The writ of fieri facias was sued out by the plaintiff, after the Court had risen on the last day of the Term; and after that day the sheriff had no power to do any thing. There is no evidence that the sheriff had notice of any goods that Western was possessed of; and, therefore, no negligence can be imputed to the sheriff. Another point, which must put an end to this action, is:—Machin and Debenham's execution was prior to this. Now, if the bill of sale is good, Western had no goods; and if the bill of sale is bad, then the goods are absorbed by that execution: but either way there could be no goods to satisfy the plaintiff's execution. And as an action is brought for a false return to Machin and Debenham's writ, if the goods were Western's, the sheriff would, if a verdict was found against him here, have to answer twice for the same goods.

BEST, C. J. If you have returned nulla bona to Machin and Debenham's

execution, that will not protect you.

Vaughan, Serjt. We are also in a condition to prove, that, before both these executions, the goods were sold by bill of sale to a person named Crook, who kept a man in *possession of them. If the bill of sale is valid, the goods did not belong to Western, and the return is a true one; and as to the late delivery of the writ of execution, it should be observed, that the sheriff could not instruct counsel to move to enlarge the time for returning the writ, as it was on the last day of the Term, and the Court had risen.

BEST, C. J. If the sheriff had not been in possession of the proceeds of the goods, he had abundant cause to show against an attachment; he might have stated that the execution was issued to hurt him, and not for the purpose of

being executed.

On the subject of the bill of sale, evidence was given, that, on the 10th of March, 1825, Crook, who was the sheriff's broker, took the bill of sale of the goods at the desire of Western; and that a man belonging to the officer of the sheriff in Mrs. Stone's execution, kept possession: and Crook stated, in his cross-examination, that Western was to have the goods back again, if he could repay the amount, and that he (Crook) had been repaid the consideration money on the bill of sale, by a person named Langdon, who was a friend of Western, to whom he had agreed to execute an assignment of the bill of sale; and he also proved that Western paid the man who kept the possession.

BEST, C. J. The sheriff has in this case returned, that there were no goods of Western, on which he could levy; and a sheriff is justified in so returning, unless he has the goods in his own possession, or has notice where they are. If, in the present case, the sheriff had not had a control over these goods, I should have told the jury, that the writ coming in at half-past five was too late, and that the sheriff was not bound to execute it. But here the sheriff keeps possession of the goods. There had been a writ of fieri facias at the suit of Machin and Debenham. If that had been executed, and these goods applied to it, that would have been a difference. But the sheriff returns nulla bona to that writ; and he cannot protect himself from the consequences of the false return by another. Then a bill of sale is set up. The question is, Whether the jury believe that to be a fair transaction, or whether the goods were really bought with the debtor's money; because, if so, it would be fraudulent. If Langdon bought the goods out and out, the bill of sale protects the goods; but if he only bought with Western's money, it is a fraud.

Verdict for the plaintiff—Damages, 3701.

Wilde, Serjt., and Chitty, for the plaintiff.

Vaughan, Serjt., and Carrington, for the defendants.

SYMES v. LARBY.

In replevia, if the defendant avow for rent in arrear, and the plaintiff replies, non tensit, on which issue is joined; if the plaintiff does not appear by himself or his counsel to open the pleadings, he may be nonsuited, although it is the defendant's record.

REPLEVIN. The defendant avowed as bailiff of Henry Jackson for rest arrear. Plea.—Non tenuit; on which issue was joined.

No counsel appeared for the plaintiff.

BEST, C. J. I think, as the plaintiff is not here by himself or his counsel, I

ought to nonsuit.

Vaughan, Serjt., for the defendant. It has been considered, that as it is the defendant's record, he must prove his case and take a verdict, though no one appears for the plaintiff.

Carrington, for the defendant, then opened the pleadings.

BEST, C. J. I still think I ought to nonsuit.

Chitty, amicus curiæ. I remember a case some years ago, exactly like this, in the Court of King's Bench. 'The difficulty raised there was, that, as it was the defendant's "record, the plaintiff could not lose his writ of nisi prius; but my Lord Chief Justice thought, that as the plaintiff did not appear, he might be nonsuited.

BEST, C. J. I entirely concur with my Lord Chief Justice Abborr on this point. The plaintiff's counsel should appear to open the pleadings, and if the

plaintiff does not appear when called, he must be nonsuited.

The plaintiff was then called three times, and not appearing, a nonsuit was recorded.

Vaughan, Serjt., and Carrington, for the defendant.

[Attornies—R. Hughes, and Smith & B.]

PROWETT v. CRACKNALL et al.

Repleven. Avowry for rent arrear. Plea—Riens in arrear.

The defendants had brought down the record. The plaintiff did not appear; the pleatings were not opened; but a nonsuit was entered immediately; and it was there said, that the Court of King's Bench had very lately, in Banc, decided that such was the proper course.

Vaughan, Serjt., and Payne, for the defendants.

[Attornies-Bowden & W., and Richardson & P.]

[This case was tried at Nisi Prins before BEST, C. J., December 6th, 1826.] A similar doubt was formerly entertained, whether a plaintiff could be nonsuited after a plea of tender, but it is now held that he may. See the case of Anderson v. Shaw, ente, p. 85.

SULLIVAN v. BISHOP.

A landlord has no right to distrain for double rent upon a weekly tenant, who holds over after a notice to quit.

Case for an illegal distress. The first count was for an excessive distress. The second count was for not selling, at the expiration of five days, under stat. 2 William & Mary, sess. 1, c. 5, s. 2. There was also a count in trover for the article seized.

It appeared, that, on the 6th October, the defendant distrained on the plaintiff, who was his tenant by the *week, for a sum of 15s., 5s. of

it being for one week's rent previous to, and 10s. for another week's rent,

(which was charged double,) after a notice to quit.

The article seized was a table, of the value of two guineas. The sum of 10s., being the two weeks' single ment, was tendered on the 4th of October. The broker, when he seized on the 6th, did not demand any specific sum, nor was any tender made at that time. On the part of the plaintiff, the case of Lloyd v. Rosbee, 2 Camp. 453, was relied on, to show that the defendant could have no right to claim a double rent under the statute.

Wilde, Serjt., for the defendant, contended, that the action would not lie. The party had a clear right to distrain; and he only seized a single article. A second offer of the 10s. should have been made to the broker. A landlord is not bound to look round with a microscopic eye to select the nearest article in value to the sum claimed. The taking the same article for 15s. which might have been seized for 10s. is not such an excessive distress as will maintain an action. The statute, which speaks of double rent, is intended not as a penalty, but for the relief of the landlord. The sum is in the nature of an increased rent, and recoverable, as the former rent, on the original contract.

Best, C. J. The broker must be taken to have demanded the 15s.: if he had demanded the 10s. only, I think it would have done. If there had been no tender, I should have thought the difference of 5s. too small to support an action. I feel this description of tenants to be a class, with respect to whom the statute would do more good than any other, because it would be a dreadful thing to be put to bring ejectment against weekly tenants. But as my Lord *361] Ellenborough's is the only authority upon that *subject, I shall act upon it. I am of opinion that the plaintiff is entitled to a verdict for small damages, as the defendant might have had all his rent. I will give my Brother Wilde leave to move for a nonsuit.

With respect to the not selling at the expiration of five days, it appeared that the writ in the action had been served before that time had expired.

Verdict for the plaintiff—Damages, 1s., the table to be given up. Vaughan, Serjt., and Comyn, for the plaintiff.
Wilde, Serjt., for the defendant.

[Attornies-J. M. Hill, and Richardson.]

In the ensuing Michaelmas Term, Wilde, Serjt., moved, pursuant to the leave given at the trial, to enter a nonsuit, but the Court refused a rule.

 † The point decided in that case is, that "debt for double value on 4 Geo. 2, c. 28, does not lie against a weekly tenant."

CHINN v. MORRIS.

If a constable tell a person given into his charge, that he must go with him before a magistrate, and such person in consequence goes quietly, without any force being used by that constable, it is a sufficient imprisonment to support an action of trespass. Evidence of reasonable suspicion of felony may be given in mitigation of damages, in an action of false imprisonment.

TRESPASS and false imprisonment. Plea—General issue.

A constable proved, that the defendant, who was a butcher, gave the plaintiff,
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who was of the same business, into his custody, on a charge of stealing a quantity of fat; upon which he told the plaintiff that he must go to Union Hall; that the plaintiff made no resistance; and that in consequence no force was used. A charge of felony was preferred before the magistrate, and dismissed by him, because the defendant could not identify the fat as his property.

For the defendant, it was submitted, that the action would not lie, as there was no actual imprisonment, or assault; and as a malicious charge might be

the ground of another and different form of action.

*Best, C. J. I am of opinion that this is an imprisonment. I should think it an imprisonment, if a constable told me that I must go to Union Hall; for I should know that if I refused, he would compel me. I think it amounts to a trespass.

The case of Stonehouse v. Elliott was cited.†

BEST, C. J., allowed evidence of reasonable suspicion of felony to be given in mitigation of damages; and in summing up, his Lordship told the jury that a justification would have been of no use, because the defendant could not have proved that a felony had been committed, as he could not identify the stolen property as his own. If the defendant intended to injure the plaintiff, and to prevent his being a rival in trade, then the plaintiff would be entitled to large damages; but if he honestly took him before a magistrate, believing that a felony had been committed, and that he was doing his duty to the public, then small damages would be sufficient. The defendant, as a plain unlettered man, might imagine that there was sufficient evidence, when a magistrate, knowing the law, might be of a different opinion. His Lordship then left it to the jury to say, under what motives the defendant had acted; and they returned a

Verdict for the plaintiff—Damages, one farthing.

*Wilde, Serjt., and Wilde, for the plaintiff.

Spankie, Serjt., for the defendant.

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[Attornies-Harmer, and Chester.]

† The point ruled in that case, as reported in 1 Esp. N. P. C. 273, that the action should be for malicious prosecution, was overruled on a motion for a new trial, which will be found in 6 T. R. 315; when it was held, that if one suspect a person of having robbed him, and deliver him over to a constable, such party, if innocent, may maintain trespass. And in the case of Samuel v. Payse, Doug. 345, it was held, that a constable may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but that a private person cannot. Rowever, in the case of Arrowsmith v. Lemesurier, 2 N. R. 211, it was held, that, where a constable showed the plaintiff a warrant, and the party went with the constable to a magistrate, this was no imprisonment, as the warrant was only used as a summons. See also the case of Russen v. Lucas, ante, Vol. 1, p. 153.

BEFORE MR. JUSTICE GASELEE,

(Who sat for the Lord Chief Justice.)

WILSON (a Pauper) v. COHEN et al.

The brokers to certain ship owners, charged their employers certain sums of money for work done to their ships under the head of stevedore. The labor of a stevedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the ship owners were aware that the brokers charged them more than they paid the workmen, but made no objection, on account of their zeal and diligence:—Held, that one of the workmen, under such circumstances, could not maintain an action for the larger sums received by the brokers, as money had and received to his use.

Assumpsite for money had and received to the plaintiff's use for the work and labor of a stevedore, to certain ships belonging to Messrs. Goldsmith of Co., to whom the defendants were brokers, and for which they had charged their employers the under-mentioned sums, viz. for the Albion, 15l.; for the Alexander, 15l.; for the Alliance, 10l.; for the Duckenfield, 15l.; for the Harcourt, 25l.; for the Julius Cæsar, 15l.; for the Zephyr, 12l. 10s. There was a ship called the Wellesley, for which no charge under the head of stevedore had been made by the defendants. The declaration also contained counts for work and labor.

The defendants had employed the plaintiff to perform the duty of a steve-dore to the ships in question. One of the partners in Messrs. Goldsmith's house, who was called as a witness for the plaintiff, said, that they knew that the defendants charged them more than they actually paid the workmen, but that they shut their eyes to the fact, on account of the great zeal manifested by the defendants in the management of their concerns. It appeared that the accounts between the defendants and Messrs. Goldsmith, were running accounts

Wilde, Serjt., for the defendant, applied for a nonsuit.

GASELEE, J. My opinion is very strongly against the *plaintiff; but, as he is a pauper, I will not stop the cause, but give you leave to move. Wilde, Serjt., then contended, that the plaintiff was not entitled to recover from the defendants the amount which they had charged to their employers. The title stevedore is an item which imports not a payment to a particular man, but the charges of loading the ships generally. The circumstance of there being no charge made under the head of stevedore for the ship Wellesley, shows that there was a particular mode of dealing between the defendants and Messrs. Goldsmiths, differing from that which existed between the defendants and the workmen employed under them.

A witness then proved that he had paid the plaintiff, during a period of two years, several sums of money for acting as stevedore to various ships, sometimes by previous agreement for a specific sum, and sometimes without any agreement. That, at the time of payment, the plaintiff had said, that he ought to have more, but took what was given, and subsequently accepted employment, for which he was paid at the same rate. A sum of 2l. had been paid to the plaintiff for the ship Julius Cæsar by the defendants. There were charges under different titles in the accounts between the defendants and Messrs. Goldsmith: such, for instance, as dunnage, but there was no general charge made

for commission.

GAS LIGHT Co. v. Nicholls T. T. 1826. 620 F364

GASELEE, J., in summing up, said, I am still of opinion that the plaintiff has not made out his title to receive the difference between the sum paid him and that charged by the defendants to Messrs. Goldsmith. It does not follow that, because the defendants have charged Messrs. Goldsmith too much, therefore the plaintiff can recover it of them. As to the accounts, there is no charge for commission or for trouble; but there are a variety of charges, such as dunnage, Therefore, it is quite clear, that the contract between Messrs. Goldsmiths and the defendants, was not, that the latter were merely to charge the money out of pocket. I do not understand the effect of the evidence to be, that the defendants have actually received the money; but that will not make any difference. There is another question on the pleadings, whether the plaintiff has been properly paid by the defendants. You may give him, on the counts for work and labor, as much as you think he ought to have, provided there was no agreement for the sum actually received, and provided he has not by his acts shown that he was satisfied with what had been paid him. There being no charge for the Wellesley under the head of stevedore, shows that the charges were of an ad libitum description.

The Jury found a verdict for the plaintiff.—Damages, 13L

Vaughan, Serjt., and Platt, for the plaintiff.

Wilde, Serit., for the defendants.

[Attornies—Warne & Son, and Coote.]

THE CITY OF LONDON GAS-LIGHT AND COKE COMPANY *. NICHOLLS et al.

The City of London Gas Light and Coke Company may maintain assumpsit for gas supplied to the occupiers of a wharf; and it is not necessary, in such a case, that there should have been any contract by deed executed by the Company.

Both of two partners are liable for gas furnished, if they have both had the use of it,

although the lease of the wharf upon which it is supplied, is granted only to one of them.

Assumest for gas supplied at a place called Sun Wharf, of which the defendants were the occupiers. It appeared that the gas pipes had been appraised to the defendants, when they took possession of the wharf, and that they had paid at times for the repair of those pipes.

Taddy, Serjt., for the defence, contended, that there was nothing to fix the defendants as contracting with a public *corporation. Unless both are [*366 bound, neither are so; and it requires something like a deed to bind a

corporation.

BEST, C. J. It is quite absurd to say, that there is any necessity for a contract by deed in such a case as this.

Campbell mentioned a case in the King's Bench, in which the Gas Com-

pany were sued as the acceptors of a bill of exchange. Taddy, Serjt., then put in the lease of the wharf, which was only granted to

one of the defendants, and contended upon this that it was wrong to sue both. BEST, C. J. It appears that the defendants have had the use of the gas; that the pipes were appraised to them, and that they have paid for the repair of them; and there is an implied undertaking on their part to pay for the gus. Verdict for the plaintiffs.

Vaughan, Serjt., and Comyn, for the plaintiffs. Taddy, Serit., and Manning, for the defendants.

KEMPSON v. SAUNDERS.

A Company formed for the purpose of making a railway, one of the regulations of which was, that fifteen thousand shares of 50l. each should be raised, and then, that applicawas, that intent moustain shares of 50t. each should be raised, and then, that application should be made to Parliamest, and which, after continuing for rather more than a year, was dissolved, because no eligible line of road could be found, is not an illegal Company, under the act 6 Geo. 1, c. 18, so as that a party, who has bought shares, may, on that account, recover back the money paid for them. But if the party who has sold shares has not complied with a regulation of the Company, stating that all transfers to be valid must be approved by a committee, so that the transfer to him was not a legal transfer. transfer, a person who has purchased of him may recover the money paid, on the ground that the consideration has failed, although he did not tender back the scrip receipts he received.

Assumert to recover back a sum of money paid as the price of certain shares in the Bristol and Northern Railway Company. An auctioneer proved, that, on the 25th of December, he sold, by desire of the defendant, twenty shares as five guineas a share, that he received the money on the 27th of December, which he paid to the defendant, and on the 4th of January, he

received the scrip receipts, which he handed over to the purchaser.

It appeared, that the Company was formed on the 13th of December, 1824; at which time certain resolutions were passed, one of which was, that books of subscriptions for raising fifteen thousand shares of 501. each, should be opened at certain specified places, and that, as soon as convenient after that number had been taken, application should be made to Parliament. On the 24th Januery, 1825, a meeting of the original subscribers appointed a permanent committee, which, on the 19th May, 1826, dissolved the Company, because no eligible line of road could be found for carrying its plans into execution. It was one of the Company's regulations, that all transfers to be valid must be made with the approval of the committee; and no entry of any transfer of shares to the defendant appeared on the Company's books. The witness who proved these facts, stated that the scheme was bona fide in contemplation.

For the plaintiff it was contended, that, having paid his money for that which could not benefit him, he was entitled to recover it back. The cases of Nockells v. Crosby,† and Josephs v. Pebrer,‡ were cited; and it was also contended

that the Company was illegal, under the statute 6 Geo. 1, c. 118.

Vaughan, Serjt., for the defendant. If the transaction was illegal, potior est

conditio defendentis; and the Court will not assist the plaintiff.

*Best, C. J., was of opinion, that the Company was not an illegal one; but that as the defendant had not the confirmation of the committee to the transfer of shares made to him, he had nothing saleable; and therefore the plaintiff might recover back the money paid, on the ground that the consideration had failed.

Vaughan, Serji., submitted, that the defendant should have tendered back the scrip receipts, which, it appeared, he had not done.

BEST, C. J., was of opinion, that that was not necessary.

Verdict for the plaintiff.—Damages, 1051.

Wilde, Serjt., and Bompas, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies—Hicks & B., and Vizard & B.]

† 5 Dow. & Ryl. 751. In that case it was held, that if the projectors of a scheme to be carried on by subscription, induce a number of persons to subscribe their money in the purchase of shares, and the scheme is abandoned before it comes into operation, the subactibers are entitled to recover back, in an action for money had and received, the whole money subscribed, free from any deduction for expenses incurred in the formation of the plan. Ante Vol. 1, pp. 341, 507.

In the ensuing Michaelmas Term, Vaughan, Serjt., moved for a new trial; but the Court refused a rule, considering the holding at Nisi Prius to be perfectly correct.

ATWOOD et al. v. GRIFFIN et al.

If an accommodation bill be drawn payable to "—— or order," and, after acceptance, the blank be filled with the name of "Groves," the bill is not thereby vitiated; and it may be sued upon without having any fresh stamp.

Assumpsit on a bill of exchange, drawn by *Harry Cook*, and accepted by the defendants for his accommodation: the plaintiffs were holders for a valuable consideration.

The bill was originally made payable to —— or order, and, after acceptance, had been aktered, by the insertion of the name of Groves in the blank.

For the plaintiff, the cases of Crutchley v. Clarence, 2 M. & S. 90, and

Crutchley v. Mann, were relied on.

*Spankie, Serjt., for the defendants, contended, that the plaintiffs ought not to recover. The bill is not the same bill. It is no matter, whether an alteration of a bill increases or diminishes the liability. If it be made after the bill is perfectly issued, it will vitiate it. In this case, the party suing is not the party making the alteration. If the bill had not been altered, and there had been a count stating it to be payable to bearer, they must have recovered. There is a misdescription. The bill is stated in the declaration to have been originally drawn, payable to Groves, and accepted after that, and delivered after that; whereas the fact is the reverse. The alteration also was contrary to the stamp act. In the Crutchley cases, the bill was not inland, and did not require any stamp.

Wilde, Serjt., for the plaintiff. Crutchley v. Clarence decides this case. The decision there is on the general grounds; and no distinction is taken as to the counts. Mr. Justice Bayley says, "The issuing the bill in blank, without the name of the payee, was an authority to a bona fide holder to insert the name."

BEST, C. J. I am clearly of opinion that this was a bill payable to order. The case of Crutchley v. Clarence has, in my opinion, answered all the points, with the exception of the point on the statute; but I think the principle of that case applies itself to that point also. Lord Ellenborough says: "As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill." And Mr. Justice Bayley says, that the issuing the bill with a blank for the payee's name was an *authority to a bona fide holder to insert the name. If so, then eccessity for a new stamp, for there is no new contract made; it is only the perfecting of the imperfect contract. It is similar in principle to the case of a man's limiting the negotiability of a bill, by indorsement to a particular person-

Wilde, Serjt., and F. Pollock, for the plaintiff. Spankie, Serjt., for the defendant.

[Attornies-G. Holmer, and Vandergucht.]

† 5 Taun. 529. & 1 Marsh. 29. The first of these cases was an action against the drawer, and the other against the acceptor of a foreign bill of exchange, which was issued with a blank for the name of the payee; and it was decided in both cases, that a beas fide holder might fill up the blank with his own name. The first case was tried in the King's Bench, sad the other in the Common Pleas.

PAGANI v. GANDOLFI.

If an agreement be entered into for the employment of a clerk for four years from the 1st of January, 1823, at a salary of 400l. a year, and the salary be paid up to the 1st of January, 1825, and in July, 1825, the clerk is dismissed from his employment, he may commence an action in Michaelmas Term, 1825, though at that time, according to the agreement, a year's salary would not be due.

The declaration (which was of *Michaelmas* Term, 6 Geo. 4) was on an agreement between the plaintiff and defendant for the employment of the plaintiff by the defendant as a clerk for four years, from 1st *January*, 1823, at 400*l*. a year. It appeared, that there were accounts between the plaintiff and defendant, on which, in the month of *February*, 1825, the plaintiff had paid to the defendant a sum of 85*l*. as a balance due to him.

The plaintiff was dismissed from his employment in the month of July,

1825, for alleged misconduct.

Taddy, Serit., applied for a nonsuit, and contended, that as by the agreement, the payments were to be made from the 1st of January, 1823; and the salary was a yearly salary; and as it appeared from the accounts that the salary must have been received up to the 1st of January, 1825, the action being brought in Michaelmas Term, 1825, was commenced too soon, because a whole year's salary would not be due till the month of January, 1826.

*BEST, C. J. But, it seems, you have dismissed the plaintiff from

*371] his employment.

Wightman. If the dismissal was wrongful, then he may be entitled to

salary; but the salary is not yet due.

BEST, C. J. I think he was not bound to wait till the end of the year, if you dismissed him previously. The jury may infer from the account put in, that payments were made from time to time: and indeed his necessities would require it. I am of opinion, that there is no foundation for the objection.

The defendant afterwards had a verdict, upon the ground that the dis-

mission was proper.

Wilde, and Adams, Serjis., and Platt, for the plaintiff. Taddy, Serji., and Wightman, for the defendant.

[Attornies-Knight & F., and Webster & Son.]

The SOUTHWARK BRIDGE COMPANY v. SILLS, RAMSAY & SILLS.

The Southwark Bridge Company may maintain assumps: t for the use and occupation of premises held under them.

Assumest for the use and occupation of certain arches under the Southwark Bridge, near to Three Cranes Wharf, of which the defendants were alleged to be the occupiers. The contract was contained in a series of letters.

Adams, Serjt., objected, that this evidence was not sufficient.

BEST, C. J., was of opinion that it was.

Adams, Serjt., then objected, that, as a corporation can only demise by deed; and as the contract in this case was not by deed, the plaintiffs were not entitled to recover.

BEST, C. J. I agree with you, that, if it be necessary to proceed upon a demise in the case of a corporation, it must be by deed; but in this case there has been use and occupation, for which I am of opinion that the defendants are bound to pay.

Verdict for the plaintiffs.

Vaughan, and Wilde, Serjts., and D. Pollock, for the plaintiffs. Adams, Serjt., and Dubois, for the defendants.

[Attornies-Nettleship, and Tyrrell & Sons.]

HEWITT v. THOMPSON.

In an action on a bill of exchange by the accord indorsee against the drawer, the first indorsee is a competent witness for the plaintiff.

Assumpsit on a bill of exchange by the second indorsee against the drawer. The first indorace was called as a witness for the plaintiff, and his testimony was objected to.

On the part of the plaintiff, it was contended, that his evidence was admissible, on the authority of Shuttleworth *v. Stevens, 1 Camp. 407; Richardson v. Allan, 2 Starkie, 334; Jordaine v. Lashbrook, and Bayley on Bills.t

Wilde, Serjt., for the defendant.-In Mr. Chitty's book, it is said, that the case of Shuttleworth v. Stevens has been overruled.

BEST, C. J. I will allow the witness to be examined, and give my brother Wilde leave to move.

The plaintiff was afterwards nonsuited.

Spankie, Serjt., and Moody, for the plaintiff.

Wilde, Serjt., for the defendants.

[Attornies—T. West, and Baddeley.]

†7 T. R. 601.—In this case, the payer and indorser was held to be a competent witness for the defendant, in an action by indorsee against acceptor. In the case of Shuttle-morth v. Stevens, the indorser was held to be a competent witness for the plaintiff in an action by indorsee against drawer, to prove that he indorsed it to the plaintiff for valuable consideration. And in the case of Richardson v. Allan, the indorser was called to prove his own indorsement, when another witness had said it was not his.

14th Edit. p. 422.—Where his Lordship lays down, that, in actions by indorsee against

drawer or acceptor, the indorser is in general a competent witness either for the plaintiff

or the defendant.

§ The learned author, at p. 415, considers the case of Shuttleworth v. Stevens as over-ruled by the cases of Jones v. Brooks, 4 Taunt. 464, and Hardwick v. Blanchard, Gow, N. P. C. 113. In the former, it was held, that in an action by indorsee against acceptor, if the defence be, that the bill was an accommodation-bill, the wife of the drawer is not a competent witness to prove that it was so; because the drawer of an accommodation-bill is bound to indemnify the acceptor against the consequences of such a bill. In the case of Hardwick v. Blanchard, Gow, N. P. C. 113, it was held, that in an action by indorse against acceptor of an accommodation-bill, the drawer was not a competent witness to prove that the plaintiff, who had discounted the bill, had received usurious interest. However, in neither of these cases is that of Shuttleworth v. Stevens expressly mentioned.

*FISHER v. ALGAR & KETTLE.

A lodger may maintain an action, if his goods are taken on an excessive distress by the

landlord of the party under whom he occupies.

The request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which those of his tenant.

Case for an excessive distress, and also for not selling within the proper time

The plaintiff was a lodger in the house of a person named Dodd, who was tenant to the defendant Kettle. The defendant Algar, who was a broker, distrained on Dodd for rent due to Kettle, and among other goods took the plaintiff's. The wife of Dodd was called as a witness; who stated, that a sum of 201. only was due, (291. being the sum distrained for,) and that there were goods enough to pay the 201. without touching those of the plaintiff. The goods remained a month upon the premises, at the request of Mrs. Dodd, before they were removed. The plaintiff was compelled to pay 151., the sum at which his goods were valued, before he could get them back.

The defendant's counsel contended, that, although the excess in the distress might be a good ground of complaint by the tenant Dodd, yet that it was no objection in the mouth of the plaintiff, who was his lodger.

BEST, C. J. I am of opinion, that if a lodger's goods are taken on an

improper distress, he may maintain an action.

It was then proved, in contradiction to the evidence of Mrs. Dodd, that the sum of 291., for which the distress had been made, was all of it due.

Wilde, Serjt., then relied on the fact of the landlord not having sold the

goods at the proper time.

BEST, C. J. That was in consequence of Mrs. Dodd's request. *Wilde, Serjt. I apprehend that she cannot bind us.

*375] BEST, C. J. I think that if the party distraining did not know which were the lodger's goods, the request of Mrs. Dodd would justify the detention. I think it would be dangerous, on such evidence as this, to find a verdict for the plaintiff, in this species of action. The evidence ought to be extremely clear. Fisher must seek his remedy over against Mr. Dodd.

Verdict for the defendants.

Wilde, Serjt., and Steer, for the plaintiff. Taddy, Serjt., for the defendant Algar. Spankie, Serjt., and Thesiger, for the defendant Kettle.

[Attornies—Fisher & G., and Scarth.]

LOADER v. KEMP.

If a leasor covenant in a lease with his lessee, that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, and not to rebuild any edditional parts which may have been erected by his tenant.

COVENANT on an indenture, dated the 8th of November, 1813, by which the defendant demised certain premises to the plaintiff, in consideration of a sum Vol. XII.--79

of 2001., and in which he (the defendant) covenanted to rebuild them, if they

should be destroyed by fire.

It appeared, that the plaintiff, after the lease was granted, erected a third story, the premises, at the time of the demise, consisting only of two. The premises had been burnt down; and the question was, Whether the landlord was bound to restore them to the state in which they were after the third story had been added.

The words of the covenant were as follow:—"And also that he (the said lessor) shall and will, in case the said messuage or tenement, shop and buildings hereby demised, or any part thereof, be burnt down or damaged by fire, as soon as may be, at his own costs and charges, rebuild and *replace the same in the same state as they were in before the happening of such fire."

BEST, C. J. It appears to me, that the landlord is only to rebuild what he let; for a landlord would be in a desperate situation, if he were bound to rebuild every thing which his tenant may think proper to set up. He might

be ruined in many cases.

The case was referred to Mr. Bingham, to ascertain all the facts, for the

purpose of raising the point for the opinion of the Court above. Vaughan, and Lawes, Serjts., and Campbell, for the plaintiff.

Wilde, Serjt., and D. Pollock, for the defendant.

[Attornies-Collins, and Lovell.]

BIRE v. MOREAU.

If an action is brought on a bill of exchange not having any English stamp, and purporting to be drawn at Paris, the defendant will be entitled to a verdict, if it appear from the evidence that the plaintiff must have been in England on the day on which it purports to have been drawn. But it would be sufficient to enable the plaintiff to recover, if the bill was drawn at a place in France nearer to England than Paris, though it be dated as from Paris.

Assumes on a bill of exchange drawn by *Pettit*, and accepted by the defendant, indorsed by *Pettit* to *Galway*, and by *Galway* to the plaintiff. The bill was in *French*, and apparently had a *French* stamp, but no *English* one, and purported to have been drawn at *Paris* on the 15th of *October*, 1824.

After the formal proof for the plaintiff, a witness was called for the defendant, who stated, that he saw Pettit, the drawer, on the 8th of October, in London; that he thought he saw him every other day during that month, and that he had no doubt that he saw him so near the 15th, that he could not have got to Paris upon that day. A lady, who lodged in the same house with Pettit, proved, that for two months previous to the beginning of November, she dined in his company every day, with the exception of a few days, (not consecutive,) when she dined out.

Taddy, Serjt., for the plaintiff. It does not lie in the mouth of the acceptor of a bill of exchange to set up this defence. The defendant has accepted this bill as drawn in Paris, and has given it credit as such. It apparently has a French stamp. The evidence to contradict the presumption of its having been drawn in Paris, ought to be of the most complete and convincing descrip-

tion.

Hatchinson, also for the plaintiff, cited Abraham v. Dubois.†

BEST, C. J., in summing up, observed—If you are quite satisfied that the bill was drawn in *England*, then the defendant is entitled to a verdict. But if it is possible for the drawer to have been absent, so as to have drawn it out of *England*, in that case the plaintiff ought to have a verdict: if the drawer got to *Calais*, and drew the bill there, and dated it as from *Paris*, I think that will do. The question is, are you quite satisfied that the bill was drawn in this country: if you are, you will find a verdict for the defendant; for then it is a fraud upon the revenue of this country, which either party may take advantage of.

Verdict for the defendant.

Taddy, Serjt., and Hutchinson, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies-Tottie & Co., and Hubert.]

†4 Camp. 269. This was an action on a bill of exchange, dated Paris, March 1st. The defence was, that it had been drawn in London, and was void for want of a stamp. The proof given was, that the drawer was in London on the 3d of March, at 11 o'clock in the forencon. Lord Ellenberough said, that as the drawing a bill in England, purporting to be drawn abroad, for the purpose of evading the stamp-duties, was a very serious offence, the fact must be made out by distinct evidence. His Lordship ruled, that the evidence given was not sufficient; and the plaintiff had a verdict.

*378] *MONEYPENNY v. HARTLAND et al.

If an engineer is employed by a committee for erecting a bridge and forming a road to it, to make an estimate of the expense of the works, he is bound to ascertain for himself, by experiments, the nature of the soil; although a person previously employed by such committee, having made the experiments, gives him, by their desire, information of the result.

If an engineer, employed as above, makes a low estimate, and thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it; and it turns out afterwards that such estimate is incorrect, either from negligence or want of skill, and that the work cannot be done but at a much greater expense, he is not entitled to recover any thing for his trouble in making such estimate.

Issue to try whether the plaintiff was entitled to any and what sum, for work and labor as an architect and engineer. The defendants were restrained by an order of the Vice Chancellor, from setting up partnership as a defence. plaintiff was employed by the defendants, who were the trustees appointed by the subscribers to the undertaking, to make an estimate of the expense of erecting a bridge over the Severn, and making a road thereto. It appeared that a person named Holland was employed by the committee, previous to the employment of the plaintiff, to ascertain by boring the nature of the soil, and that he informed the plaintiff of the result of his experiments, and that the plaintiff acted upon that information, in making his estimate, and did not make any experiments himself. Holland reported the soil to be of hard marl rock. The plaintiff laid the foundations of the bridge, about forty yards distant from the spot marked out in his plan, for the sake of a more convenient turn into the town of *Tewkesbury*; and it was found, after the work was begun, that the soil at that part being of clay, required piling and planking, which created an expense of 1400l. in addition to the sum mentioned in the estimate. The expense of making the road was estimated at 1700l., but, in point of fact, it cost 3,3001., in addition to that sum. The estimates were made in November,

1822; the work was begun in June, 1823. On the 1st of September, 1823, the plaintiff, for the first time, examined the foundation, and discovered that, from the nature of the soil of the river, piling and planking would be required. In the month of February, 1824, the plaintiff was dismissed from his employment, and Mr. Telford engaged in his stead. The plaintiff had attended at the House of Commons while the bill was in progress; and several surveyors proved that the usual charge for such attendance, was five guineas per day.

*Taddy, Serjt., for the defendants. Inasmuch as the defendants relied on the plaintiff's skill, as to the propriety of the situation, and the expense of the work; he ought not to have been satisfied with the information given him by Mr. Holland, but should have made experiments to ascertain the facts for himself. Though Holland might be directed to give the plaintiff information, the plaintiff was not thereby released by the committee from the necessity of making further inquiries. It was to raise the amount mentioned in the estimate, and that amount only, that the subscriptions were made. If the plaintiff's report was wanted in a hurry, he might have made it, with a reservation of the particular point, as to the nature of the soil. He cited Moneypenny v. Hartland, (ante, Vol. 1, p. 352.)

Mr. Telford was examined on the part of the defendants, and stated, that it was the duty of an architect or engineer to examine for himself into the nature of the soil; and that he ought to consider himself responsible for it, though another person had given him information on the subject.

A road surveyor was also called, who stated, that he had estimated the expense of making the road from the Mythe to the Hollybush-Hill, (the road in question,) at the sum of 5,1504, and that it could not possibly be made for the sum of 1700l., which was the amount of the plaintiff's estimate.

It was also proved, that the plaintiff had put down his name for some shares in the concern, in the following form :- "George Moneypenny, as Architect and Surveyor to the Bridge and Roads, 500l.;" and it was admitted that this sum had been demanded in the month of May, 1824.

All the witnesses, both for the plaintiff and defendant, agreed as to the plaintiff's due and diligent attendance at the House of Commons.

Vaughan, Serjt., for the plaintiff. If complaint be *made against a party employed, the first question is, has the party employing derived any benefit from his services; if so, he must pay for them, and seek his remedy by a cross action. Supposing an action had been brought by the defendants against the plaintiff for the omission of the planking and piling, what would they have made of it? He has not been guilty of negligence as Holland says, that he was employed by the Committee before the plaintiff came, and made all the preliminary arrangements, and reported the result several times. It would have been officious and unnecessary for the plaintiff, after that, to have undertaken the boring himself. An estimate must be taken to mean, that the expense will be there or thereabout. If it were followed up by a contract, then it might be different. The plaintiff was relieved from the necessity of any particular examination of the soil by the conduct of the trustees and their confidential surveyor, Holland, who turned out to be mistaken. The foundations were laid with parade and ceremony either in August or September, 1823, and complaint was not made till the month of February, 1824. The delay shows that the objection was an afterthought. The plaintiff's witnesses say, that there are often contingencies in a work; and there is in the plaintiff's estimate an item of 2000l. for contingen-They have not sustained any damage in consequence of the plaintiff's not having bored. With respect to the subscription, it was done to show his good opinion of the undertaking.

BEST, C. J. The first question will be, whether the plaintiff is entitled to any compensation; and if he is, then, whether it will extend beyond the 500l.; for I am clearly of opinion that he is answerable for the subscription. With

respect to the first question, the cases appear to be conflicting; and there is some difficulty. I shall take the liberty of laying down this rule. Supposing negligence or want of skill to be sufficiently made out, unless *that negligence or want of skill has been to an extent that has rendered the work useless to the defendants, they must pay him, and seek their remedy in a cross action. For if it were not so, a man, by a small error, might deprive himself of his whole remuneration. It appears, that Mr. Telford adopted a part of the plaintiff's plan; and up to that extent the defendants have been benefited. I grant, that it is not a trifling deviation from an estimate, that is to prevent a party's recovering. But if a surveyor delivers in an estimate, greatly below the sum at which the work can be done, and thereby induces a private person to undertake what he would not otherwise do; then I think he is not entitled to recover: and this doctrine is precisely applicable to public works. There are many in this metropolis which would never have been undertaken at all, had it not been for the absurd estimates of surveyors. I think, if it was so in the present case, the plaintiff is not entitled to recover. And it appears from the case cited, that my Lord Chief Justice Abbott was of the same opinion. His Lordship says, "I think it of great importance to the public, that gentlemen in the situation of the plaintiff should know, that if they make estimates, and do not use all reasonable care to make themselves informed, they are not entitled to recover any thing." And to this I am disposed to add a qualification. which is found in my brother Bayley's opinion. His words are, "The plaintiff claims as much as his services are worth; and if he led his employers into a great expense by his want of care, his services would be worth nothing. If you think the lowness of the estimate in this case induced the parties to undertake the work, then you should find your verdict for the defendants. It is said to-day, that there is a difference between an estimate and a contract. I do not agree in that observation: between honest men there is no difference at all. A man should not estimate a work at a price at which he would not contract for it; for if he does, he deceives his employer. It appears, that 14001. in addition to the *estimate, was required for planking and piling, and 3,3001., in addition to the 17001., for the completion of the road. Is a man to tell me that a thing can be done for 17001., which cannot be completed for less than 50001.? But it is said, there has been no negligence here, because the plaintiff had been informed by another of the state of the soil. In my opinion, he should not have trusted to such information. But I do not act apon my own opinion alone: for I find the opinion of Mr. Telford is the same. But, it seems, the plaintiff did not, in fact, act upon the information; for he built the bridge forty yards distant from the spot where he was told the marl rock had been found. However great the plaintiff's skill, it seems to me impossible to say, that he has conducted himself properly in this case. With respect to the road, were not the trustees to understand, that for the sum mentioned in the estimate it was to be done to their satisfaction, and that of the public? You will ask yourselves these two questions:--1st. Is there not great want of skill, or great want of attention? 2dly. Do you think these defendants would have engaged in this scheme if they had been truly informed upon the subject? If you doubt, incline against the plaintiff. I do not think the charges proved to be customary by the surveyors, who have been called, are at all improper, when I consider the great skill and talent which these gentlemen must bring to bear upon the questions submitted to their judgment.

The jury found for the plaintiff, damages 7501., saying, that they held the plaintiff liable to pay his subscription of 500l., if the

subscribers paid their proportions.

Vaughan, and Wilde, Serjts., and Campbell, for the plaintiff. Taddy, Serit., and Patteson, for the defendants.

*In the ensuing Michaelmas Term, a rule nisi was obtained for reducing the damages to 2501., which was not argued, as the plaintiff consented to take his verdict for that sum.

If the surveyor to an undertaking of this sort is a shareholder in the work, he cannot recover his charges in an action. *Holmes* v. *Higgins*, 2 Dow. & Ry. 196, a short abstract of which will be found, ante, Vol. 1, p. 353, n. (a,) but must proceed in equity.

WELLS v. HORTON, Executrix of BLISSETT.

A person borrowed a sum of money in the year 1807. In the year 1815, he stated, by parol, to the attorney of the party entitled to it, that he had made provision by his will, and had directed his executors to pay it at his death. He died in the year 1825, without having made any such provision.—Held, in an action against the executor, that the promise was good, and the money recoverable; that neither the statute of frauds nor the statute of limitations applied to the case; and that a moral obligation to pay was a sufficient consideration for the promise.

Assumpsit. The first five counts were on promises by the testator for money lent, money paid, &c. The sixth count stated, that the testator, in his lifetime, on the 1st of January, 1808, was indebted to Mary, the wife of the plaintiff, then being sole and unmarried, for money lent and forborne; and the said money remaining unpaid, the said testator in his life-time afterwards, and after intermarriage of said plaintiff and the said Mary, on the 1st of January, 1816, in consideration that the said plaintiff would forbear to proceed against him for the recovery of the money during his life-time, undertook and promised the said plaintiff that his executor should, after his decease, as such executor, pay to the said plaintiff the said sum of money. It then averred, that the plaintiff did forbear to proceed against the testator, and that assets came to the hands of the defendant more than sufficient to pay debts, legacies, &c. The seventh count was similar to the sixth, except that it contained no averment either of forbestance or of assets. The eighth count was on an account stated between the plaintiff and defendant. The pleas were the general issue and the statute of limitations.

A clerk in the bank proved, that in the stock ledger, in the year 1807, there was a sum of 3108l. 9s. 7d. standing in the name of Mary Blissett, (who was the daughter of the testator;) and that sum was transferred to the testator by a power of attorney given to him on the 2d of October, *in that year. Mary [*384 Blissett was married to the plaintiff in October, 1812.

Mr. Montriou, an attorney, was then called as a witness. He stated, that on the 13th June, 1815, he had an interview with the testator, at the request of the plaintiff. He told him, that the plaintiff and his wife wished to make a settlement of Mrs. Wells's share of the residuary estate of Mr. Tibbs, preparatory to which they were desirous of coming to some arrangement with him as to the payment of that part of it which had been lent to him. The testator said, they were aware he could not return the money in his life-time; that he had made several proposals to the plaintiff about it, to which, if he did not think proper to accede, or if he inconveniently pressed him for payment, he should erase his and his daughter's name out of his will altogether. The winness replied, that it was not the plaintiff's intention to press him inconveniently, but he wished that some arrangement might be made. The testator said, that he had made provision by his will, and had directed his executors to pay the money, meaning the specific sum; and he thought that the best security which

the plaintiff could have. The witness observed, that a will was always revokable, and that it was hardly to be expected that the plaintiff should rely upon it, and suggested the giving a bond or promissory note, to which the testator objected. The witness then proposed a letter, stating what his intentions were. The testator said, that he would not subscribe any writing; that the plaintiff knew well his intentions towards his daughter, and that if he was not satisfied with the repayment at his death, he might take his own course. The witness said, he would relate what had passed to the plaintiff, but could not say whether he would agree to it or not. The witness did communicate it to the plaintiff, for whom he was, at the time, professionally concerned; and he was not say, whether the forbearance was particularly upon the stated that he could not say, whether the forbearance was particularly upon the faith of the testator's promise. On his *cross-examination, he said, that the plaintiff and his wife were separated, and that the plaintiff was a sugar-broker, and in the year 1824 stopped payment, and paid 2s. 6d. in the pound.

The will of the testator, proved the 2d of January, 1826, was read. It appointed the defendant sole executor. It gave a sum of 100l. a year to the testator's wife, 50l. a year for the maintenance of a natural son, and 50l. a year for the maintenance of a natural daughter. It then gave an annuity of 100l. a year to the plaintiff's wife for life, to be paid half-yearly, separate and apart from the control of any husband. This annuity, after her death, was to go to his granddaughter, Rose Wells, and after her decease was to form part of the residuary estate. The residuary estate was given to the testator's son and daughter; and if they should die before the age of twenty-one, then it was to go to his next of kin living at the death of the survivor of such son and daughter. The property was sworn under 18,000l.

Onslow, Serjt., for the defendant. As to the special counts, the plaintiff ought to be nonsuited, as the promise proved by the witness was not such as to support what is laid in them. And, with respect to the money counts, the

statute of limitations puts them out of the question.

BEST, C. J. I think that the seventh count is proved.

Onslow, Serjt. Does not your Lordship think that the statute of limitations applies to that count?

BEST, C. J. I think not, as the undertaking was to do something on a cer-

tain event, which event has occurred within the six years.

Onslow, Serjt., then submitted, that the statute of frauds was applicable to

the case, and the promise ought to have been made in writing.

*Best, C. I. I think the contingency might have happened within the year; and that will bring it within the case mentioned in Selwyn about the ship's coming back.† I myself think, that a judge at Nisi Prius is not warranted in going against the decision of a Court. I act upon the decision, but will give you leave to move the Court upon the subject.

Onslow, Serjt. There is no consideration to support this special promise. Best, C. J. I think there is plenty of consideration. There was a moral obligation to pay; and I hope that the judges in Westminster Hall will always hold, that a moral obligation to pay is a sufficient consideration for a promise to pay.

[†] Anonymous, Pas. 5 W. & M. C. B. Salkeld, 280. A parol promise was made to pay a sum of money on the return of a certain ship. The ship did not return till two years after the promise. All the Judges held, that the promise was good, and not within the statute of frauds, saying, that it only extended to such promises, where, by the express sppointment of the party, the thing was not to be performed within a year, and that, by possibility, the return of the ship might have been within the year, though, by accident, it happened to have been delayed beyond it. This case was cited and approved by Mr. Justice Wilmot, in a case of Fenton v. Emblers, executor of May, reported in 3 Burr. 1278. In that case, the Court of King's Bench held, that the statute did not apply to a parol promise by a master to pay yearly wages to a servant, and also by his last will and testament to give and bequeath to such servant a legacy or annuity of 161, a year for life.

Onslow, Serjt. The words of the promise proved, are, that he had made provision, and had directed his executors to pay. This is in the past tense,

and the declaration is in the future.

BEST, C. J., in summing up, said—If you think the plaintiff was induced to forego his claim in consequence of *his expecting a legacy, though he is disappointed in his expectation, yet he cannot recover. I am of opinion, that the words, "I have made provision," used by the testator, are sufficient to satisfy the count in the declaration. If you think the testator made the specific promise, then the plaintiff is entitled to a verdict. If he merely promised to make provision generally, but not with a reference to the specific sum, though the provision was not sufficient, yet the plaintiff cannot recover.

Verdict for the plaintiff.

Bosanquet, Serjt., and Holroyd, for the plaintiff. Onslow, and Spankie, Serjts., for the defendant.

[Attornies—Baxendale, T. & U., and Warne.]

In the ensuing *Michaelmas* Term, a rule nisi was obtained, pursuant to the leave given, which was discharged after argument.

DEAN et al. v. M'GHIE et al.

If the brokers to a mortgagee of a ship, who has taken possession, receive the freight, it is not recoverable from them in an action of assumpsit by the assignees of the mortgage, (he having become bankrupt,) if a sum equal in amount has been applied by the mortgagee to the payment of the seamen's wages.

Assumpsir. The plaintiffs were the assignees of a bankrupt named *Prince*, and the defendants were the brokers of a person named *Chance*. The action was brought to recover a sum of money, which had been paid to the defend-

ants as the freight of a ship called the Rosalind.

A clerk from the Custom House produced the books kept there, relating to the ownership of vessels, from which it appeared, that on the 29th of December, 1824, the bankrupt, Prince, was the owner of the Rosalind; and he proved, that on the 3d of March, 1826, an indorsement was made on the register of a transfer from Prince to Chance of the whole of the ship, by a bill of sale by way of mortgage, dated the 16th of November, 1825. The indorsement was not made earlier, because the ship was away on a voyage; but the witness stated, that the bill of sale was shown to him on the 25th of November, 1825. Prince *became bankrupt on the 4th of February, 1826. The freight was paid to the defendants in the months of March and June, 1826, and they paid it over to their principal, Chance, by whom they were indemnified, but not till after they had received notice not to do so from the plainiffs. The right of the plainiffs to sue as assignees was admitted.

For the plaintiffs, it was contended, that they were entitled to recover; because Prince, whom they represented, continued to be owner of the ship, not

withstanding the mortgage, and as such was entitled to the freight. The 4 Geo. 4, c. 41, s. 43, was referred to.t

For the defendants, it was contended, that the statute referred to had no operation in the case of a mortgagee in possession; and also, on the authority of the case of Dixon v. Hamond, that, being the agents of Chance, they could *not dispute his title, but were bound to pay over to him the money *389] they received.

The bill of sale, by way of mortgage, dated 16th November, 1825, was then offered in evidence. It had no stamp, and therefore was objected to. answer this objection, the statute 6 Geo. 4, c. 41, s. 1, was referred to.

BEST, C. J., was of opinion, that the transfer was good.

It was then stated, that the bill of sale contained, in addition to the assignment of the ship, an assignment of a policy of insurance; it was contended, that as such assignment was not mentioned in the statute which had been referred to, the instrument was not valid unless it were stamped.

Best, C. J. I am of opinion, that that circumstance only makes it void pro

tanto.

The bill of sale was then read. It was for a loan of 8000l. The day for redemption was the 16th of January, 1826. Proof was then given, that, on *2001 the 26th of January, 1826, *a person took the command of the ship, by order of the defendants, on behalf of *Chance*, when she was on her homeward voyage, at a place called the Lower Hope, a few miles below Gravesend; and also that nearly double the amount sought to be recovered by the plaintiffs had been expended in the payment of the wages of the seamen.

BEST, C. J., upon this, observed to the plaintiff's counsel—As this is an

action for money had and received, can you recover?

Plaintiff's Counsel. They are not at liberty to throw all this upon the

freight?

BEST, C. J. The action of assumpsit is an equitable action; and my Lord Mansfield said, that, in assumpsit, you can recover nothing but what you are entitled to receive in equity. You were liable to pay these things; and the

† That section enacts as follows:—" That when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or of assignment to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of readering the ship or vessel, above or observe to frankferred excepts. for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise, for the payment of the debt or debts, for securing the payment of which such transfer shall have been made."

12B. & A. 310. It was there held, that an agent cannot dispute the title of his principal; and, therefore, where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight, and charged them with the premiums, &c., and on a loss happening, received the money from the underwriters:—Held, that he was accountable to the assignces of the surviving part ner for the surplus, after payment of his own debt, and not to the executors of the deceased nature.

partner, to whom the ship originally belonged.

§ That section enacts as follows:—"That from and after the passing of this act, [10th June, 1825,] all stamp duties now payable in Great Britain and Ireland respectively, upon or in respect of any bill of sale, or any conveyance, assignment, or other deed or instrument whatever, for the sale, transfer, or other disposition, either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel, shall wholly cease, determine, and be no longer paid or payable any thing in any act or acts of parliament contained to the contrary thereof in anywise notwithstanding,"

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defendants have paid them for you; therefore, you cannot recover the money from them. I am of opinion, that the plaintiff must be called.

Nonsuit.

Bosanquet, and Taddy, Serjts., and Evans, for the plaintiffs. Wilde, and Adams, Serits., for the defendants.

[Attornies—Kearsey & S., and Bell & B.]

In the ensuing Michaelmas term, a rule nisi for setting aside the nonsuit was obtained, which was discharged after argument.

*KING v. BUTTERWORTH et al.

F*391

(Special Jury.)

The occupiers of houses in Serjeant's Inn, Fleet-street, are not liable to pay poor's rates to the parish of St. Dunstan in the West.

Trespass for breaking and entering the dwelling house of the plaintif, situate in a certain place called Serjeant's Inn, in Fleet-street, and taking away his goods and chattels. Plea-Not guilty.†

It was admitted, that the defendants were overseers of the parish of &. Dunstan in the West; that they entered the plaintiff's house, which was numbered 11 in, and always formed a part of, Serjeant's Inn; that they took the goods of the plaintiff as a distress for poor's rates claimed by the parish; that the plaintiff was the occupier of the house in question; and that the rate had been both properly made and demanded; and also, that the locus was within the city of London.

The question was, whether Serjeant's Inn, Fleet-street, formed a part of the parish of St. Dunstan, and as such was liable to the payment of poor's rates. This was the first time that the claim had been made, and the absence of any previous demand was relied on by the plaintiff as sufficient to call on the defendants to make out their case.

Wilde, Serjt., for the defendants, then argued as follows: - In former times, opinions and prejudices, not well founded, led to the neglect or omission on the part of parishes of calling upon some persons to pay rates, who, in point of law, ought to have been so called on. That has been the case in the present instance. About the fourteenth century, a man named Dalby bequeathed a *sum of money to the Dean and Chapter of York, for the purpose of founding a chauntry, in which masses might be said for the repose of his soul. With this masses the his soul. With this money, the dean and chapter purchased a house in & Dunstan's in the West, standing on the present site of Serjeant's Inn. It formed no part of a monastery, nor was it subject to any peculiar jurisdiction.

[†] By the statute 43 Eliz. c. 2, s. 19, it is enacted, that if any action of trespass or other suit shall happen to be attempted and brought against any person for taking of any distress, &c., by authority of that act, the defendant may either plead not guilty, or justify, &c.

It remained in the hands of the dean and chapter till the Reformation, when it was supposed to have escheated to the crown as property devoted to superstitious uses; and in consequence, in the reign of Edward the Sixth, it was seized into the hands of the crown, and some short time after sold to Lord Chief Justice Montague. Previously to the purchase by the Dean and Chapter of York, an inquiry, by writ of ad quod damnum, was made in the ninth year of Henry the Fourth, (1408,) which was followed in 1409 by a license to hold in mortmain. Both these documents describe the property as situate in the parish of St. Dunstan. The grant to Lord Chief Justice Montague, as well as a particular made out previous to such grant, in the third year of Edward the Sixth, mention a messuage-house and hereditaments, commonly called Serjeant's Inn, in the occupation of the judges under a lease for years, and certain other houses and shops in Fleet-street, in the possession of other persons, but describe them all as in the parish of St. Dunstan, and identify the property, by adding, "commonly called Dalby's chauntry." These houses and shops in *Fleet-street*, being occupied by tradesmen, have been rated for many years. The messuage called Serjeant's Inn continued to be occupied by Lord Chief Justice Montague, and the other judges, for a considerable time; and the whole property is described in the will of the Lord Chief Justice as being within the parish, no distinction being made between the large house and the shops, &c., in the occupation of the tradesmen. Some time after this, it was conceived, that the property had never legally vested in the crown, and an action of ejectment was brought by a person named Holloway, a tenant of one of the shops in Fleet-street, to try the right. The renue in this action was laid in St. Dunstan's, and there would have been a nonsuit, if that had not been proved. The Jury also found a special verdict, in which, from the beginning to the end, the whole of the property is described as in the parish. The result of this action was, that by a judgment in error, pronounced in the second year of James the First, the property was restored to the Dean and Chapter of York, who have possessed it ever since. In the year 1676, the judges and serjeants, who at that time lived in the inn,

the year 1070, the judges and serjeants, who at that time lived in the lin, the case is reported as follows, in Croke James, p. 51.—"Holloway v. Watkins. Ejectione firms, for a house adjoining to Serjeant's line in Fleet-street, and depending upon the same title. Upon a special verdict the case was—The Dean and Chapter of York had devised unto them, by one Dalby, 4001, to the in:ent to find a chantery in their church perpetually, and an obit for the soul of Dalby, and that the chantery priest should have 48 marks yearly, &c. King Henry the Fourth granted licence unto them to purchase those houses in Fleet-street and other land in York, ad onera et opera prictatis, in the will Dalby mentioned to be performed; whereupon they purchased this land, and made ordinances how that priest should be maintained, and agreed with the executors of Dalby for the finding him perpetually; and they confess the receipt of that 4001, devised to them, and obliged themselves ac omnia bona sua ad performandum, &c. And it was found, that the dean and chapter employed 81 for the maintenance of a priest, and other sums for the maintenance of an obit, and that those lands were, in prime Edw. 6, certified to be employed for a chantery; and the stat. of prime Edw. 6 was found, and the proviso thereix for deans and chapters, &c. And that the king had it as chantery land, and gave it to Sir Edward Montague, &c., under whom the defendant claims. And the dean and chapter entered and let to the plaintiff, and if, &c. And it was moved, that this was a chantery indeed, or at least in reputation, and so given to the king; and of that opinion were Daniel and Warberton. For it spears, that the lands were purchased for this cause, and to this purpose, and a priest maintained therewith; so as it is a chantery in reputation, if it be not in fact: nor were those lands the proper possessions to the dean and chapter, within the intent of the proviso of the statute; but their possessions to this purpose only; and therefore they are given to the king given b

At the time when this case was decided, there were five judges of the Common P.eas, which will account for the plaintiff's having a majority in his favor, after two of them had

given their opinions against him.

were desirous of having a chapel consecrated there, and in consequence they petitioned; and a deed of consecration was executed, in which the description accords with that in the other documents; and in it there is a clause saving "the rights and oblations" of the parish of St. Dunsten "to it of right or custom or in any wise howsoever due." Now, this being an ecclesiastical instrament, (and the division of parishes being an ecclesiastical matter,) it is a document of great authority on the subject of the present claim. Would not the judges and serjeants have got some exception inserted, if it were true that the parish had no rights within the Inn? But, in addition to this, the parish were, about this time, at expenses for accommodation for the judges in the parish church, and paying the parish officers for attendance upon them. There is no doubt but the judges gave largely in charity, and respect for their feelings might lead the parish officers to omit them in the rates, especially as rates at that time were not of much importance. But they could not have put them-selves to expense in repairing pews, &c., for the judges, if the judges had not been parishioners. About the year 1658, monthly assessments were made, according to districts, by commissioners, for the use of the commonwealth: and those assessments for Serjeant's Inn were collected amongst those made in the parish of St. Dunstan. It is clear, that some part of this property, which is all held under one title, has been rated to the poor; and if an exception can be claimed for the place, then it will be edifficult to account for this circumstance; but if, as I contend, the exception was to the persons, and not to the place, then the situation of the persons, being judges of the realm, furnishes a reasonable ground for such exception.

Translations, examined with the originals, were then put in, of the writ of ad quod damnum, the license to hold in mortmain, the particular, and the grant from the crown to Lord Chief Justice Mentague, as were also an examined copy of his Lordship's will, and the judgment in the 2d James I. The deed of consecration of the chapel in the year 1676 was also put in. The whole of these documents corresponded with the statement given of them by

Wilde, Serjt.

Mr. Hopkins, the vestry clerk of the parish, then produced from the parish records an ancient book, called "Domesday-book," commencing 1st Eliz. (1558.) There was an item, among others, of 6s. 2d., received of the judges and serjeants for the finding of buckets to be used in case of fire. The winess also produced the Scavenger's Rate-books for the years 1627 and 1628. There was a charge of "Serjeant's Inn, 5s.," and an item of 3s. 6d. for a house next but one to Serjeant's Inn, occupied by Matthew Holloway, and 3s. 6d. for another, and 2s. 8d. for another, and then came Ram Alley, for which no charge was made.

[The back parts of some of the houses in Serjeant's Inn are built upon ground which was formerly the site of houses in Ram Alley, and which is

clearly within the parish of St. Dunstan.]

The Vestry Minute Book was then produced, containing the churchwardens' accounts examined and allowed by the vestry. In the account for the year 1600, were the following items: "Paid for the underpinning of my Lord Chief Justice's pew, 6s.;" "Paid, mending my Lord Chief Justice's pew, and the other pews, 40s." In the account for 1609, was an item, "Paid, for Serjeant's Inn, three quarters of a year, for font water, 1s. 6d." Under the date of the 20th of October, 1634, was an entry of an "order of vestry, that 1e396 the senior churchwarden should provide twelve green cushions for the judges' pews in the church. In the account for the year 1661, was an order of the 4th of September, for the payment of 8s. and 4s. to the two staff-men "for attending the judges in Serjeant's Inn, both in Fleet-street and Chancery-lane, during the four last Terms." There was also an order for the parish officers to advise with the judges upon certain matters relating to the parish interests. Evidence was also given of the assessments made in the time of the

They were stated to be made on the inhabitants and land-Commonwealth. lords of houses in the city part of St. Dunstan's, and to be charged monthly on the said parish, for the temporary supply of the armies and navies. There was this entry, "In the precinct next Ludgate: Serjeant's Inn, on the land-lord, 6s. 3d." There was an entry of 4s. charged on the landlord of two houses adjoining. Entries of a similar description were continued up to Christmas, 1661.

The stat. 25 Car. 2, c. 1, was also referred to as bearing on the subject.

Mr. Hopkins, the "estry clerk, was then cross-examined by Vaughan, Serjt. He said, that he had been a parishioner for thirty years; that he had collected Easter-offerings for the vicar from some gentlemen in the Inn; that he was on the committee that prepared the act of the 1st Geo. 4, c. 59,† for the purpose of giving the vicar the rectory; that the seven names there specifically enumerated were the names of occupiers of those houses, parts of which abutted upon Ram Alley, (being numbers 1 to 7, to the gate leading into the chapel;) and that the reason why they *stopped there was, that the parish did not wish to disturb the old modus. He admitted, that for fifteen years, during which he had been connected with the perambulations on Ascension-day, he never remembered their going into Serjeant's Inn. The gates were shut; and the parish officers neither knocked nor used any other means for the purpose of obtaining admission.

Vaughan, Serjt., for the plaintiff, then contended, that it was clear that the locus in question was not part of the parish of St. Dunstan. If it were so considered, it is most extraordinary, that several centuries should have been suffered to elapse without any claim for poor's rates being made. The question is, whether it is part and parcel of the parish, and subject to its jurisdiction; and not whether it is locally situate within it. The case of Marsden v. Waithman, tried on the 17th of this month, before Lord Chief Justice Abbott, is an authority against the claim of this parish. Much reliance has been placed on the description of the property in the documents put in; but as it is clear that a part of the property mentioned in those documents was within the parish, that will account for the circumstance of its being so described generally. is said, that in Holloway v. Watkins, as the venue was laid in St. Dunstan's, there would have been a nonsuit, if that had not been proved; but in that case, the question of parochiality was not likely to be agitated; for the object there was, to try the right of property; and the particular house was Matthew Holloway's house, which was one that was indisputably within the parish. With *398] respect to the *repairs of the pews, the Lord Chief Justice, for underpinning whose seat a charge appears to have been made, might have lived in Bell-yard or in Chancery-lane. This same evidence was used on a former trial, as applying to Serjeant's Inn, Chancery Lane. Under the Landtax Act, 4 W. & M. c. 1, s. 130, the land-tax for Serjeant's Inn was collected as for a separate precinct, and so continued till the reign of George the Second, and then it was provided that it should be collected by the district collector of the City of London. In addition to all this, the non-assertion of any right of entry into Serjeant's Inn by the parish in their perambulations, is a strong circumstance against the claim now made, as is also the fact of there being no other rates made upon the Inn, except the scavenger's rate.

which was admitted to be in the parish.

That was an action brought to try whether Thavie's Inn was liable to contribute to the poor's rates of the parish of St. Andrew, Holbern; and it was there held, that a place might be locally situate within a parish, without being part and parcel of that parish; and the jury, on the evidence there given, were of opinion, that Thavie's Inn was not part and parcel of the parish of St. Andrew, Holbern.

[†] A local and personal act.—The title of the act is, "An Act for uniting the Rectory and Vicarage of the Parish of St. Dunstan in the West, in the City of London, and for making a certain Annual Payment to the Rector of the parish, in lieu of Tithes." In a schedule to that act, every house in the parish is enumerated; but that schedule does not contain any of the houses in Serjeant's Inn, except seven, parts of which are in Ram Alley,

*Vaughan, and Bosanquet, Serjts., and F. Pollock, for the plaintiff.

Wilde, and Spankie, Serjts., and Merewether, for the defendants.

[Attornies—Baxendale, T. & U., and Morshead.]

In the ensuing Michaelmas Term, Wilde, Serjt., moved for a new trial, but the Court refused a rule.

BLIGH v. WELLESLEY.

A person, to whom certain letters required to be produced on a trial, were written, said, that he had searched in a particular box in which he thought he had put them, without being able to find them, but added, that he thought they were somewhere in his possession, but that he had not searched ic any other place than the box:—Held, that enough had not been done to let in secondary evidence of the contents of the letters.

CRIM. Con. Certain letters, written by Mr. Hamilton, the English minister at the Court of Naples, to the defendant, on the subject of an application made to him to introduce Mrs. Bligh at that Court, after she had left her husband's house, were tendered in evidence. The letters of the defendant, to which Mr. Hamilton's were answers, were not in Court. Mr. Hamilton, who was called as a witness, stated that he thought he had put them in a particular box, which box he had searched, and did not find them in it; but he added, that he thought they were somewhere in his possession; and he had not searched in any other place than the box to which he had alluded.

BEST, C. J., was of opinion, that enough had not been done to let in secondary evidence of the contents of the defendant's letters, and that, without

those letters, the answers of Mr. Hamilton could not be read.

It subsequently appeared in the course of the trial, that these letters of Mr. Hamilton had been found in some apartments occupied by the defendant and Mrs. Bligh, under an assumed name, and which apartments they had suddenly left.

*Best, C. J., upon this, allowed them to be received, not as proof of their contents, but as evidence of a notice to the defendant of the grounds upon which Mrs. Bligh professed to have left the house and protection of her husband.

Verdict for the plaintiff—Damages, 6000l. Vaughan, and Wilde, Serjts., and D. F. Jones, for the plaintiff. Scarlett, Spankie, Serjt., and Brougham, for the defendant.

[Attornies—Lowless, C. & B., and Griffith.]

PERRING, Bart., et al., v. HONE.

Gertain persons, directors of a Company, borrowed of certain bankers, for the use of the Company, 2000l., for which they gave a joint and several note. Shortly afterwards, at a meeting of the directors, at which one of them was not present, half the money was paid off, and a joint promissory note drawn, to which the signatures of all the directors were obtained: this note, on being tendered to the bankers, was refused; upon which the secretary of the Company, who had no general authority, consulted with two of the directors, neither of them being the one who did not attend the meeting; and, with their permission, added to the note the words, jointly and severally.—Held, in an action on the note by the bankers against such one director, that he was not liable, though, on being written to for payment, his only reply was, that, from the death of a relation, he could not then attend to the subject, but would give it his earliest attention:—Held also, in the same case, that such one director was not liable upon the original consideration, though he was present when the money was borrowed, it appearing that one of the plaintiffs, the firm being composed of three, was an original holder of shares, which had been afterwards sold, and the produce of them paid to another of the plaintiffs.

Assumpsir on a promissory note for 1000l.

The plaintiffs were bankers in London, and the defendant one of eight directors of a Company, called "The Imperial Distillery Company." At a

meeting of the directors, at which the defendant attended, a sum of 2000l. was lent to the Company by the plaintiffs, and a joint and several promissory note, at six months, was given for it. Some short time after, by a resolution of the directors, at a meeting which the defendant did not attend, half of the money was repaid, upon which the first note was cancelled, and the one in question given for the remaining sum. It was dated the 4th of February, 1826, and was for payment at three months. When this note was signed by the defendant and the rest of the directors, (with the exception of one,) it did not contain the words, "jointly and "severally." It was taken in that state to the plaintiffs, who refused to receive it, unless it was made a joint and several note, as the former had been. Upon this, the secretary, who had not any general authority to accept bills, after consulting two of the directors, altered the note, by adding the words "jointly and severally." The plaintiffs then received the note, and, on the 8th of May, they wrote to the defendant for payment. On the 9th, the defendant sent an answer to their letter, expressive of regret, that, on account of the recent death of his father, it would not be in his power to see his coadjutors for some days on the subject of it, but stating that he would give it the earliest possible attention.

BEST, C. J., was of opinion, that this letter was not sufficient to show an

assent by the defendant to the alteration made.

Taddy, Serjt., for the plaintiffs, then contended, that they were entitled to recover on the money counts, the defendant having been present at the meeting

at which the original sum of 2000l. was lent.

For the purpose of answering this, by establishing a partnership between plaintiff and defendant, the secretary was asked whether Sir John Perring was not one of the original subscribers to the Company, and he stated that he was, and produced a book, in which the name of Sir John Perring appeared, among many others. In reply to the objection of partnership, proof was given of a sale of forty shares and scrip receipts by a broker, the money obtained for which was paid to Mr. Barber, a member of the *plaintiffs' house, the firm consisting of Sir John Perring, Mr. Shaw, and Mr. Barber.

It was contended, that, by this sale, any connection which plaintiffs might have had with the Company was put an end to. A deed was produced, purporting to be between the directors, and such of the subscribers as had set their hands and seals. There were many seals with names against them, and many without. The names of neither of the plaintiffs were among the number.

BEST, C. J., directed the plaintiffs to be called, upon two grounds: First, because, on account of the alteration, they could not sue upon the note; and Secondly, because Sir John Perring having been proved to be one of the original members of the Company, and there being no evidence of his having ceased to be a member, he must be taken to be a partner in the concern, and therefore not entitled to recover against his co-partners; and his Lordship gave it as his opinion, that, when a person has once become a member of such a Company, he must be taken to continue so with all his liabilities, until such time as he shall get rid of his connection with it, by the assent of the other members.

Leave was given for a motion to set aside the nonsuit, and enter a ver-

dict for the plaintiff.

Taddy, Serjt., and Moody, for the plaintiffs. Wilde, and Adams, Serjts., for the defendant.

[Attornies-Gregson & F., and Fisher & N.]

† They were in this form:—"London, 28th March, 1825, Received of the Directors of the Imperial Distillery Company, 251.

"For Mesers. Pitt, Because & Co."

In the ensuing Michaelmas Term, Taddy, Serjt., moved, pursuant to the leave given, to set aside the nonsuit. As to the point of the alteration, if an alteration takes place, in pursuance of the original intention of the parties, and before the issuing of the note, that is, before it gets into the shands of a party who may sue upon it, it will do. He cited Kershaw v. Coxit referred to in Knill v. Williams, 10 East, 433.

GASELEE, J. In Kershaw v. Cox, there was no dispute as to the authority;

here, the alteration was made by consent of all parties.

Taddy, Serjt. It may be inferred, from the nature of the transaction, that it was the intention of the parties to give a joint and several note; and in such a case a very little evidence of assent will be sufficient. And there is enough in the defendant's letter to establish such evidence; for he does not say, "I never became liable," nor "the contract was not joint and several," but only gives a reason for postponing his attention to the application. Then, with respect to the question of partnership, the book put in by the secretary was not legal evidence, according to the case of Fraser v. Hopkins, 2 Taun. 5.

BEST, C. J. There was a sale by Mr. Barber of forty of the receipts for

money paid.

Taddy, Serjt. The purchase and sale were by the individual partners, and not by the plaintiff's firm.

BEST, C. J. They should have got their names struck out of the list.

Taddy, Serjt. There was no evidence that we knew of it. The list was a mere prospectus. Though two of the "plaintiffs were individually partners in the concern with the defendant, yet that will not prevent a recovery by the firm. He also cited the cases of Downes v. Richardson and Others, and Bolton v. Puller and Others.

The Court granted a rule to show cause.

The rule came on to be argued in the course of the Term.

Wilde, Serjt., showed cause. There is no difference between these parties as distillers and any other trading house in London. It is said, that by the sale *406] of the receipts, the parties have got rid of their connection with *the Company; but, have they sold their responsibility? or their liability to indemnify the directors, who may have made themselves personally answerable

† 3 Esp. N. P. C. 246. The point there decided, is, that where a bill of exchange was put into circulation by indorsement, though it wanted the words "or order," the insertion of those words by the drawer, with the consent of the parties, neither vitiated the instrument, nor made a new stamp necessary.

15 B. & A. 674. An accommodation bill was jointly made by three persons as drawer, acceptor, and first indorser, which was afterwards parted with for value; but, previous to its being so parted with, its date was altered. The acceptor, when he was informed of it, assented to the alteration:—Held, that it was no snewer to an action on the bill against him, that the alteration had been made without the consent of the drawer and first indorser: Also, that a fresh stamp was not necessary, the bill having been altered before it was issued; because, being an accommodation bill, it could not be said to be issued till some PERSON got it, who was entitled to treat it as a security available in law.

him, that the alteration had been made without the consent of the drawer and first indorser: Also, that a fresh stamp was not necessary, the bill having been altered before it was issued; because, being an accommodation bill, it could not be said to be issued till some person got it, who was entitled to treat it as a security available in law.

§1 Bos. & P. 539. A., B., C., and D., were partners in a banking-house at Liverpool, and C. and D. also carried on a separate mercantile concern in London; J. S., having accepted bills payable at the house of C. and D., employed A., B., C., and D. to get them paid accordingly, and agreed to deposit with them good bills, indorsed by him, for the purpose of enabling them so to do. A., B., C., and D. debited J. S. in account for his accept ances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A., B., C., and D., to C. and D., upon the general account between the two houses; and before any of the acceptances of J. S. became due, both houses failed, and J. S. was obliged to pay his own acceptances:—Held, that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A., B., C., and B.

to the public? In the deed, which is dated the 19th of *March*, 1825, there is a clause, that, if a member wishes to retire from the concern, he must give notice to the directors of some person to succeed him. Sir *John Perring* may, by the sale, have secured to himself an equitable right to place some other person ultimately in his shoes; but he cannot, by the sale only, get rid of his liability to the directors, who took the responsibility of management on the crediof the general partnership. With respect to the alteration, the cases cited on the motion for a rule nisi were cases on the stamp act; and the alterations were made by the parties, or by competent authority on their behalf. But, in this case, the secretary allowed that he had no authority, but said that he had asked two of the directors, (the defendant not being one,) and, having obtained

their permission, made the alteration, thinking it no harm.

Taddy, Serjt., in support of the rule. If there was a partnership, then the directors formed a part of that partnership; and the alteration of the note having been made with the assent, and by the authority of two of them, it will be sufficient to bind the rest. But the three plaintiffs were not partners with the Company. It appears, that Mr. Shaw had no connection with the concern. As Sir John Perring did not sign the deed, the circumstance of his merely buying could not make him a partner. The Vice Chancellor has lately, in this Term, decided that there was fraud on the part of the directors, and that the subscribers are entitled to relief against them. Therefore, the argument that the subscribers had induced the directors to manage on their responsibility, must fall to the ground. There is no evidence of any assent on the part of Sir John Perring to the insertion of his name in the book. *The selling of the receipts is merely the assignment of a chose in action, if, indeed, it amounts to that; or perhaps it is rather the parting with an incheste right, a shadow of a shade, a thing which may be something. It is the wildest doctrine in the world to contend, that persons who never act in any way are to be considered as partners. As the defendant did not write a second letter, the first might be considered by the Jury as a waiver of his objection to the alteration of the note.

BEST, C. J. I do not intend to impute any thing morally wrong to Sir John Perring. I agree with the Vice Chancellor's decision, as it is reported to me. In this case there are two points: First, Whether the plaintiffs can recover upon the note. I am of opinion that they cannot, because the alteration was made in it without the defendant's authority. I was not desired at the trial to leave the letter to the Jury as evidence of assent. But I think, that it is no evidence of assent at all. The authority of one partner to bind another does not extend to the alteration of a joint note into a joint and several one. But the second question in the case is the most important, and that is, if the plaintiffs can recover upon the original consideration. It appears, that the defendant was present when the money was first advanced; but then it was not advanced for his individual benefit, but it was paid to the bankers of the Company. It is said, that Sir John Perring was not a member, because he did not execute the deed; but I take leave to say, that, if there be a deed, persons who act on it by lending money under it, give their assent to it, and, being original subscribers, make themselves members. The regulation is a good one, which requires notice to be given of a successor, because otherwise a man might keep his shares till a Company was in a falling situstion, and then withdraw, and release himself from all responsibility. A man who subscribes to a Company, looks to the *character of his co-sub-scribers; and it would be mischievous to let them renounce their responsibility, and get rid of their liabilities, as they would of their great coats. I hope that this decision will make great people cautious, how, by appearing as members of companies, they induce individuals to subscribe, and, when the shares are high, sell them, and think by so doing to throw the responsibility upon those who are left as holders of them. His Lordship then declared the

spinion of the Court to be, that as Sir John Perring had been proved to be a partner with the defendant in the Company, the plaintiffs were not in a situation to maintain their action against him.

Rule discharged.

The case of Bosonquet v. Wray, 6 Taun. 597, was mentioned in the course of the argument. One of the points there decided was, that the partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in the plaintiff's house is also a member, for transactions which took place while he was a partner in both houses. Upon the subject of Joint Stock Companies, the following cases have been recently

decided :--

KEASLEY v. CODD, Esq.

ASSUMPSIT for goods sold and delivered. The plaintiff was a harness maker, and the defendant one of the members of a Company, called "The London Carrier Company;" and the action was brought to recover a sum of 51. 18s. 6d., for articles delivered by the plaintiff at the premises of the Company, in Great Queen-street, Lincoln's Inn Fields. No evidence was adduced as to who gave the order for the goods. On the 26th of May, 1826, the plaintiff's attorney wrote to the defendant, requesting payment of the money, or to be furnished with the name of the defendant's solicitor. The defendant himself did not answer this letter, but on the 2d of June a letter was received from his attorney, stating (among other things) that the London Carrier Company consisted of a number of persons, of which the defendant was only one, and adding, that the Company was insolvent, and requesting a postponement of the matter till it could be ascertained how much in the pound its funds would be able to pay.

ABDOTT, C. J. Well?—One must pay for all.

*Denmans, for the defendant. I am in a situation to show, that the Company was never regularly constituted.

*Denman, for the defendant. I am is a second never regularly constituted.

ABBOTT, C. J. That will make no difference. It is important, that the public should know, that if persons connect themselves with a Company of this description, they are every one of them liable to pay the demands upon it.

Verdict for the plaintiff.—Damages, 5l. 18s. 6d.

Comys., for the plaintiff.

Denmes, C. S., and F. Pollock, for the defendant.

[Attornies-T. Dignam, and Milburn.]

(Before BATLEY, J., who sat for the Lord Chief Justice.)

MAUDSLAY v. LE BLANC, Esq.

Assumpsir for work and labor. The plaintiff was an engineer, who sued the defendant as one of the directors of the Steam Washing Company, for a sum of 31731, for a steam engine and other machinery erected on the premises of the Company at Claphom.

The defendant was proved to have been a director in May, 1825; and it appeared, that in June in that year, an order, which had been given previously to the month of May, by a person named Tyrrell, for the machinery in question, was confirmed by the directors at a meeting which the defendant did not attend, but he attended at subsequent meetings, and also inspected the works while they were in progress. The defendant's name was in a printed paper, purporting to be a prospectus issued by the Company, one of the terms of which was, that a deed should be executed by the members.

Parke, for the defendant, contended, that he was not liable. There is no evidence to connect the defendant with this particular order. The only proof is, that he acted generally as a director. The terms of the prospectus show, that there must be a deed.

Batler, J. How are the public to know whether there is a deed or not?

Parke. The only way in which the public can know that the defendant is a director, is

by the printed prospectus, and that same prospectus requires that there should be a deed. There is no credit given to the defendant. They are bound to show, that he executed the deed.

BATERY, J. I think they are not. I shall take it for granted, that the defendant weald never have continued to act as a director so long, without he had executed the realised. It appears to me, that he is liable as a partner. He was at the meetings of the directors, acting from time to time, and went to see the works in progress. I think, therefore, it is impossible to say that he is not liable.

Verdict for the plaintiff.—Damages, 3173l.

Scarlett, Gurney, and Steer, for the plaintiff. Parke, for the defendant.

[Attornies-Browning, and J. S. Clarke,]

In the case of Watkins v. Huntley, tried December 11th, 1826, which was an astion brought against a proprietor of shares in the Equitable Loca Bank Company, by a person to whom he had sold them, to recover back the money paid, because the Company was dissolved,—Best, C. J., held, that the plaintiff was entitled to recover, on the ground that the consideration had failed; and his Lordship said, that in the case of Kempses v. Saunders, (ente, p. 366,) the Court of Common Pleas, on the motion for a new trial, had expressed a similar opinion.

OXFORD SPRING CIRCUIT.

1826.

BEFORE MR. JUSTICE PARK, AND MR. BARON GARROW

(Of admitting King's Evidence.)

The Judges will not, in general, admit an accomplice as king's evidence, though applied to for that purpose, in the usual way, by the counsel for the prosecution, if it appear that such accomplice is charged with any other felony than that on the trial of which he is to be a witness.

This was laid down in several cases by Mr. Justice PARK in this Circuit.

This practice appears to have been resolved on in consequence of the cases of Rez v. Lee, Russ. & Ry. C. C. R. 361, and Res v. Branton, Russ. & Ry. C. C. R. 454. In each of those cases, an accomplice in one capital felony had been admitted as king's evidence, but at the same assize was himself convicted of another distinct capital felony; and in bath cases the Judges held, that, as matter of right, the king's evidence was not exempt from prosecution for offences distinct from that respecting which he gave evidence; but that it was in the discretion of the learned Judge, whether the sentence for the capital effence, of which he was convicted, should be carried into effect.

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*BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

REX . MARY ANN KING and AMY KING.

A receiver of stolen securities for money is not punishable as an accessory to the felony, under the stat. 3 Geo. 4, c. 24. It is considered, that, from its inaccuracy, no conviction can take place on that statute.

The prisoner, Mary Ann King, was indicted for stealing one 10l. and two 5l. promissory notes, the property of Thomas Thame; and the other prisoner,

Amy King, was charged with having feloniously received the same, knowing

them to have been stolen. The facts being clearly made out,-

Curvood, for the prisoners, contended, on the part of the receiver, that she ought not to be convicted. It had been held, that receivers of stolen securities for money were not punishable as accessories to the felony before the passing of the statute 3 Geo. 4, c. 24; and that statute being so inaccurately penned, that learned Judges had thought that no conviction ought to take place upon it.

PARK, J., observed, that that had been the opinion of the Judges, in which he completely concurred; and his Lordship therefore directed the receiver to

be acquitted.

The Jury then found the principal—Guilty; the receiver—Not Guilty. Justice, for the prosecution. Curwood, for the prisoners.

[Attornies-Tomes, and Compigny & D.]

Receivers of stolen securities for money have been held not to be punishable as accessories to the felony. This was decided in the cases of Sadi and Morris, I Leach, 458, and 2 Ea. P. C. 748; and in Gaze's case, Russ. & Ry. C. C. R. 384, where the Judge held, that although a statute, which creates a new felony, will attach to that felony all the common law incidents to felony, so that accessories thereto will be included, yet it will go no farther; and a receiver of stolen goods not being a common law accessory, it will not affect him.

*REX v. JAMES STREEK.

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If at the assizes a prisoner is tried for a misdemeanor under the commission of juil delivery, and during the trial becomes ill, and is obliged to be assisted out of Court, the Judge will discharge the Jury; and the consent of his counsel, that the trial shall proceed in his absence, is considered not sufficient to authorize the trial to proceed. If the prisoner recovers during the assize, he may be tried, the whole of the proceedings of the trial being commenced de nove.

THE prisoner, who was in custody, was indicted for an assault on Sophis Woodley, with intent to commit a rape. The examination in chief of the prosecutrix was nearly concluded, when the prisoner fainted away, and was, by order of the learned Judge, assisted out of Court.

The prisoner's counsel consented that the trial should proceed in his absence; and the examination of the prosecutrix was further proceeded with

for a short time.

Pare, J., however, doubted, whether, as the prisoner was tried under the commission of jail delivery, it would not be a mis-trial, if the case proceeded in his absence; and (having conferred with Garrow, B.) his Lordship observed, that the case could not go on in the absence of the prisoner without his consent; and he doubted whether the consent of his counsel would be sufficient, this not being like the case of a defendant, who is absent when the judgment is given on him in the Court of King's Bench, as that is done with his own consent, and generally on his own application. His Lordship then discharged the Jury, and

Adjourned.

The prisoner having sufficiently recovered, the trial was commenced de novo. The Jury were resworn, the usual proclamations made, and the witnesses resworn, when

PARK, J., said, that the prosecutrix should be examined de novo, if either party desired it.

But, by consent, her evidence, as far as it had gone, was read over to her; and she stated it to be true. The trial then proceeded as in other cases.

Verduct—Guilty.

*Talfourd, for the prosecution.

Curwood, for the prisoner.

[Attornies—Newbury, and Compigny & D.]

In the case of Rex v. Edwards, Russ. & Ry. C. C. R. 224, where a juror became ill during the trial, so that he was incapable of attending the remainder of the trial, it was held by the twelve Judges that the Jury might be discharged, and the prisoner be tried to root that another juror might be added to the eleven; but if another juror were added, it was considered, that, in cases of felony, the prisoner should be offered his challenges over again as to the eleven, and that they should be sworn de nove.

OXFORD ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. SIMON ROSENSTEIN.

If, on the trial of an indictment for publishing an obscene snuff-box, a witness prove that the defendant exhibited to him the box produced on the trial, or a box exactly similar, this is not sufficient, if the witness cannot identify it as the very box exhibited to him. Semble, that a count charging the defendant with having an obscene libel in his possession with intent to publish it, is not good.

INDICTMENT for publishing an obscene libel, in offering for sale a snuff-box containing an indecent painting. Another count of the indictment charged the defendant with having another snuff-box of the same kind in his possession, with intent to publish it. But this latter count was abandoned at the outset of the case, on the suggestion of the learned Judge, who thought it highly doubtful whether it could be sustained in point of law.

Mr. Ince, a commoner of Brazen-nose College, being called for the prosecution, and a snuff-box, such as was described in the indictment, (which, with others, was found on the prisoner's person,) being put into his hand, stated that the prisoner had produced to him a box which was either the very same, or one precisely similar, and had asked him to purchase it, but that he declined doing so, and returned the box to the prisoner. He stated, that he could not swear to the identity of the box produced, as he *knew that snuff-boxes were made in considerable numbers of the same pattern, and therefore the box produced might be only a similar one.

The defendant's counsel objected, that it must be proved, that the box pro-

duced was the identical box offered to Mr. Ince.

PARK, J. If the Jury are not satisfied by the evidence that this was the identical snuff-box offered by the prisoner, he must be acquitted. It is abso-

Intely essential that the box itself should be shown to be the very same, which is not done in this case.

Verdict-Not Guilty.

Cross, for the prosecution. Curwood, for the prisoner.

[Attornies—Morrell and Roberson.]

In the case of Res v. Hes. Rebert Johnson, a letter from the defendant, asking a third party to publish certain libels, was lost, and on the trial of an information against the defendant for the publishing of those libels, secondary evidence was given of the centents of that letter. It may, therefore, be proper to consider, whether, if the identical libel published was in the possession of the defendant, and he had notice to produce it, and did not, ascendary evidence might not be given.

BEFORE MR, BARON GARROW

REX v. JOHN STIMPSON.

On an indictment for a larceny, if the prosecutor rests his case on the prisoner's recent possession of the goods, and the prisoner call a witness to prove that he (the prisoner) bought them of J. T.; if the prosecutor call J. T., he can only ask him as to such matters as go to negative the prisoner's case, and cannot prove by him that he saw the prisoner commit the theft.

Indictment, for stealing peas from a granary.

The case for the prosecution rested merely on the fact of a part of the peas being found in the house of the prisoner, shortly after they were lost.

For the defence, the prisoner's daughter proved, that the prisoner had pur-

chased the peas from a person named Taylor, for three shillings.

Twiss, for the prosecution, proposed to call Taylor, to prove, not only that the prisoner did not buy the peas of him, but that, on the contrary, Taylor saw

the prisoner steal them, and assisted him in so doing.

Carrington, for the prisoner, objected, that the prosecutor was not then at liberty to adduce further evidence of the prisoner's guilt. The learned Judge might, at any period of the cause, ask any question for the furtherance of justice, but the prosecutor, after the evidence given by the prisoner's daughter, could only give such matters in proof, as went to contradict the specific facts deposed to by her: as that Taylor did not sell the peas, or that the price was not three shillings, or the like.

GARROW, B. I think that is so. This witness appears to be only a witness in reply, and therefore his testimony is only admissible so far as it goes to

destroy the case set up on the part of the prisoner.

Verdict-Not Guilty.

Twiss, for the prosecution. Carrington, for the prisoner.

[Attornies, —, and D. Taunton.]

*STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PARK.

WOOLEY v. BATTE.

If a party recover damages is case against one of two joint coach proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened.

Assumestr for contribution. Plea—General issue. The plaintiff and defendant were joint proprietors of a stage coach; and damages had been recovered in an action on the case, against the former only, for an injury done to Mrs. Jeavons, a passenger, by reason of the negligence of the coachman. The plaintiff had paid the whole of the damages and costs, and brought the present action to recover half the amount from the defendant as his partner.

For the plaintiff, an examined copy of the judgment against him at the suit of the husband of Mrs. Jeavons, was put in. The declaration was in case, and stated the injury to have arisen from the negligence of the present plaintiff and his servants, (in the usual form.) It was also proved, that the plaintiff paid the amount of damages and costs in that action, amounting to 1761., under an execution; that the plaintiff and the defendant were partners in the stage coach; and that the plaintiff was not personally present when the accident happened.

Jervis, for the defendant, contended, that as the action brought against the plaintiff was an action on the case for negligence, the plaintiff and defendant were joint tort feazors; and, therefore, one only being sued, he could not recover contribution from the other; and he cited Merryweather v. Nixan.

*Campbell, for the plaintiff. No doubt the case of Merryweather v. Nixan is good law, and one tort feazer sued alone cannot recover contribution from another, who was a joint tort feazer with him; but here it is proved, that there was no personal fault in the plaintiff. The declaration of Jeavons against the present plaintiff might, with equal propriety, have been in assumpsit; in which case, the present plaintiff might clearly have recovered contribution; and it can hardly be contended, that the plaintiff should be deprived of his contribution by Mr. Jeavon's pleader drawing his declaration in one form instead of another.

PARK, J. I think the plaintiff is entitled to recover.

Verdict for the plaintiff—Damages, 881.

Campbell, and Russell, for the plaintiff. Jervis, for the defendant.

[Attornies—Willim & Son, and Shutt.]

†8 T. R. 186. In that case, the plaintiff and defendant were both sued in an action on the case for an injury done by them to the reversionary interest of a mill belonging to a person named Starkey, who recovered 8401. against both, but levied the whole on the plaintiff, who sued for contribution. Mr. Baron Thompson, who tried the cause, held, that no contribution could, by law, be claimed as between joint wrong doers; and the Court above concurred in that opinion.

which was a dividend due to her on a bankrupt's estate; and that, being very feeble, she took the defendant, who was a much younger woman, with her. The defendant prevailed on the plaintiff to let her have the money to take care of, and carry it to Messrs. Garret's Bank at Hereford, for the plaintiff's benefit. The defendant, it was proved, never paid the money in at Messrs. Garrets, and gave different accounts of what she had done with it.

The defence was, that the defendant had paid over the money to the plain-

tiff; but that entirely failed in proof.

PARK, J. I think this case comes very near a felony, It too much resembles the case of the unfortunate man at Shrewsbury, whom I sentenced to be transported a few days ago.† However, I shall leave it to the Jury to *consider, whether the defendant had the money; and if so, whether she got it into her possession with intent to steal it, and then feloniously converted it to her own use; because, if so, the debt being merged in the felony, the defendant will be entitled to the verdict; and if the Jury find for the defendant, and, on my asking them whether that is the ground of their verdict, they tell me that it is, the defendant must be sent over to the criminal side of the assizes, to take her trial for the felony; but, should the Jury take a more merciful view of the case, they may negative the felonious intent, and find a verdict for the plaintiff.

Verdict for the plaintiff.

Taunton, and —, for the plaintiff. Russel, for the defendant.

[Attornies—Pritchard, and J. Woodhouse.]

† Res v. Goods, tried at the Shropshire Spring Assixes, 1825. In that case, the prisons was indicted for stealing a 1000L note. It appeared, that he had persuaded the prosecutiz to let him have the thousand pound note, to deposit for her in the Bridgnerth Bank: she gave it to him for that purpose, but, instead of taking it to that bank, he converted it his own use. The learned Judge left it to the Jury to say, whether he obtained possession of the note with intent to steal it; for, if so, they must find him guilty: which they did, and the prisoner was sentenced to be transported for seven years.

† As to when a narry may be tried on a variest, without any hill having been found by

As to when a party may be tried on a verdiet, without any bill having been found by a Grand Jury, it is said, (2 Curw. Hawk. 291.) that in an action of trespass in the King's Bench, de muliere abducta cum bonis viri, if the defendant be found guilty of having carried away the woman and goods with force, and feloniously; or in a common action of trespose in the said Court for goods carried away, if it be found that the defendant feloniously stole them, he shall be put to answer the felony, without any further accusation; for such a charge by the oath of twelve men on their inquiry into the merits of a cause in a Court charge by the oath of twelve men on their inquiry into the merits of a cause in a Coart which has jurisdiction over the crime, is equivalent to an indictment, and the king being always in judgment of law present in Court, may take advantage of any matter therein properly disclosed for his benefit. The first of these positions is taken from 13 Ass. 6, and 13 Edw. 3, 32 a. The second, from 31 Edw. 1, Enditement, 31. But such a verdict in a Court which has no jurisdiction over criminal matters, seems to be of little force, because such Court has nothing to do with such matters. 2 Curw. Hawk. 291. In the case of The King v. Jolife, 4 T. R. 285, the law before laid down on this subject is recognized, and the Court say, that the Judge of Nisi Priss, on the trial of a cause out of the Court of King's Bench, is to be considered, to all intents, as acting under the authority of that Court, and as an emanation from it; and Lord Kenyon, at the Sittings, said, in a case of slander, that, "where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict, without the intervention of a Grand Jury. 3 Esp. 134." From this, it appears, that seck a finding by the Jury at the Sittings at Nisi Priss in the Court of King's Bench in Middleses, would be sufficient to put the party on his trial, as the Court of King's Bench sit there. With regard to such a finding by the Jury on the civil side of the assizes, Lord Hale laye down. (3 Hale, H. P. C. 151*) that "if in an action of slander for calling a mat thief, the defendant justifies that he stole goods, and issue thereupon taken, it be found for the defendant, if this be in the King's Bench, and for a felony is the same county where the defendant, if this be in the King's Bench, and for a felony in the some county when the Court sits, or if it be before the Justices of Assize, who have also a commission of fell delivery, he shall be forthwith arraigned on this verdict, as on an indictment, and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, though in a civil action, serves the King's suit as an indictment, and is not contrary to the acts of 25, 28, and 42 E. 3, which enact, "that no man shall be put to snewer, &c., but upon indictment or presentment." From this it appears, that if the finding be at the essises, the Court from which the record comes, is not material.

GLOUCESTER ASSIZES.

BEFORE MR. BARON GARROW.

REX v. SAMUEL PITMAN.

If a thief go to an inn, and, intending to steal a horse, direct the ostler to bring out his horse, pointing to that of the prosecutor, and the ostler at his desire lead out the horse for the prisoner to mount:—This is a sufficient taking by the prisoner to support an indictment for horse-stealing.

THE prisoner was indicted for stealing a mare, the property of Jonathan Blanch.

It was proved, that the prisoner came to the George Inn, at Sodbury, on the fair day, and directed the ostler to bring out his horse. The ostler said, he did not know which it was. The prisoner went into the stable, and pointing to the mare, said, "that is my horse, saddle him." The ostler did so, and the prisoner tried to mount the mare in the inn yard, but, from the noise made by some music, the mare would not stand still. The prisoner then directed the ostler to lead the mare out of the yard for him to mount. The ostler led the mare out, and before the prisoner had time to mount her, a person, who knew the mare, came up, and the prisoner was secured.

Watson, for the prisoner, objected, that this was not a felonious taking by the prisoner, as the mare was never in his possession. It all along remained in the possession of the ostler, who never parted with it; and if the mare was never in the possession of the prisoner, he could not be guilty of stealing it.

GARROW, B. If the prisoner caused the mare to be brought out of the stable, intending to steal her, and the animal being disturbed by the music, the ostler led her out of the yard for his accommodation and by his procurement, that is a sufficient taking to constitute a felony.

The defence was, that the prisoner was drunk, and took the mare by mistake; and the Jury, on that ground, found him

Not Guilty.

Justice, for the prosecution. Watson, for the prisoner.

[Attornies-Abel, and Ward.]

The strongest case on the subject of asportation is that of Res v. Walsh, Ry. & M. C. C. R. 14. There the prisoner was indicted for stealing a bag; it was proved that he had lifted the bag from the bottom of the boot of a coach, but was detected before he had got it out; it did not appear that it was entirely removed from the space it had first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part had occupied; and this was held by the twelve Judges to be a complete asportation, and the conviction for larceny was held to be right.

HOME SPRING CIRCUIT.

1826.

BEFORE LORD CHIEF BARON ALEXANDER, AND MR. BARON GRAHAM

ESSEX ASSIZES.

BEFORE MR. BARON GRAHAM.

BEARBLOCK, Clerk, v. HANCOCK.

The time when the tithe of potatoes becomes the property of the parson, is when they are dug up and laid in heaps, and not when they are "boughed out," while remaining in the ground.

Assumer for tithes bargained and sold to the defendant, of which the plaintiff was the farmer and proprietor. Pleas—The general issue; a tender of 391.; and a set-off for potatoes bargained and sold to the plaintiff, and by him had and taken.

The plaintiff was the lessee under the Warden and Fellows of New College, Oxford, of the tithes of the parish of Hornchurch, in the county of Essex; and the defendant was the tenant of a farm called "Little Nelms," in the same parish. It appeared, that in the month of June, 1824, the defendant entered into an agreement to give the plaintiff, as a composition for his tithes, (which for two years before had been taken in kind,) a sum of 60l. per annum, for a term of three years, to be computed from Old Michaelmas Day, 1823; and the plaintiff consented to make an allowance out of the first 60l. in respect of such tithes as he had actually taken in kind, between the period when the agreement was made, and the previous time from which it was to take effect. On the 13th October, 1823, the defendant wrote to the plaintiff in the following terms:—

" Mr. Bearblock,

"Tithe of potatoes in the nine acres have been set out since Monday week; I have not heard of your having been to see it. I think of taking up to-morrow," &c., &c

*It was proven, that before old *Michaelmas*, the potatoes in question had been, what is called, "boughed out," that is, boughs had been (654)

placed in the field, to mark out the different proportions of the farmer and tithe owner; but it appeared, that they had not been dug up until some time after Old Michaelmas, and that they were not in a fit state to be dug up at any earlier period.

Marryat, for the plaintiff, contended, that these potatoes, having been set out before Old Michaelmas, became then the property of the plaintiff, and were

not to be accounted for in the year commencing afterwards.

Mirehouse, for the defendant, argued, that the tenth part of the potatoes could not be said to belong to the plaintiff till they were actually dug up and separated from the rest.

Graham, B. I am of opinion, that, in point of law, potatoes are not titheable till the farmer has dug them up. The parson is entitled to the labor of the farmer, and cannot take the tithe away till it is laid up for him in heaps. The preparatory step of "boughing out," is not the actual pernancy of the tithe. A farmer could not have an action brought against him for not digging up his potatoes at a certain time, if, in the common course of good husbandry, he ought to wait a fortnight longer, or more. I am of opinion, that the parson's right does not attach till after the digging up.

Verdict for the defendant.

Marryat, and Abraham, for the plaintiff. Mirehouse, and Round, for the defendant.

[Attornies-Sterry, T. & S., and Stone & B.]

Marryat, in the ensuing Easter Term, moved to set aside the verdict, but the Court refused a rule.

OXFORD SUMMER CIRCUIT.

1828.

BEFORE MR. JUSTICE BURROUGH AND MR. BARON GARROW.

BERKSHIRE ASSIZES.

(Crown Side.)

BEFORE MR. BARON GARROW.

REX v. PRISCILLA SKERRIT and ELIZA SKERRIT.

If two prisoners are indicted for uttering a counterfeit shilling, having snother counterfeit shilling in their possession; it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of money are proved to be counterfeit; and if it appear that the two prisoners went to a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, both may be convicted; the uttering and the possession being both joint.

THE prisoners were jointly indicted for uttering a counterfeit shilling, having

another counterfeit shilling in their possession.

It was proved, that the prisoner Eliza Skerrit went into the shop of James George, and there purchased a loaf, for which she tendered a counterfeit shilling in payment: he secured her, but no more counterfeit money was found on her. The other prisoner, who had come with her, and was waiting at the shop door, then ran away, but was immediately secured, and fourteen other bad shillings were found on her, wrapped in gauze paper. James George, after the prisoners were secured, put the counterfeit shilling uttered by Eliza Skerrit, into a packet with the fourteen others; and, in his cross-examination, he stated, that he could not swear which was the particular piece of money that was uttered, but he was sure that the fifteen pieces of counterfeit coin produced by him, consisted of the one *uttered by Eliza, and the fourteen afterwards found on Priscilla; the whole fifteen were proved to be counterfeit.

Carrington, for the prisoners, objected; 1st., that it was incumbent on the prosecutor to show what identical piece of counterfeit money was uttered by the prisoners, and to show with certainty some other identical piece of counterfeit money, which they had in their possession; and that, in this case, an identification

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tion of the particular piece uttered was necessary, in the same way as, in a case of uttering a forged note, it was necessary to show the very note uttered, or in a prosecution for a libel to show the identical libel published, and not another unpublished copy, which might be found on the prisoner. And 2dly, he objected, that the complete offence was not proved against either of the prisoners; as the one who uttered the piece of money had no other counterfeit coin in her possession, and the other who had the coin, was not guilty of any uttering. It might be said, that the one who stayed outside the shop, was guilty of a joint uttering with the other who was in it; like the case of two thieves, one inside the shop and the other outside; but the case of the thieves differed from the present in this respect, viz., that the thief outside might be there to co-operate, by the removal of the stolen property or the like. Now the prisoner Priscilla Skerrit, by staying outside the shop, could not by possibility be considered as aiding her sister in the act of paying for a loaf inside the shop. And in the case of Rex v. Else, Russ. & Ry. C. C. R. 142, it was held, that if one person utter a bad piece of money, having no more, in conjunction with another, who had more bad money, but who was absent, and did not utter, neither was guilty of this offence: however, in that case, the persons were much further asunder than the prisoners had been in the present.

GARROW, B. With regard to the second objection, I think that the two prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering; and it will be for the Jury to say, whether the possession of the remaining pieces of bad money was not joint. The first objection, although it carries with it an appearance of considerable weight, seems to me also to be not well founded. The indictment charges that they uttered one piece of counterfeit money, having one other in their possession. Now we have evidence that they had originally fifteen pieces of bad money; one they uttered: it certainly cannot be shown, which of the fifteen it was that they uttered; but if it was either of those pieces, they must have been guilty of uttering one piece of counterfeit coin, having another piece in their possession, which is exactly what they are charged with. If among the whole number of pieces, there had been but one single piece of good money, the objection would have been unanswerable; because then the good piece might have been the one uttered. In the present case, I must overrule the objection.

Verdict-Guilty.

Taunton, and Shepherd, for the prosecution. Carrington, for the prisoners.

[Attornies—Chippendale, and Frankum.]

By the stat. 15 Geo. 2, c. 28, s. 3, it is enacted, "that if any person whatsoe er shall utter or tender in payment any false or counterfeit money, knowing the same to be false utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons, and shall, either the same day, or within the space of ten days then next, utter or tender in payment any more or other false or counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other-person or persons, or shall, at the time of such uttering or tendering, have about him, or her, in his or her custody, one or more piece or pieces of counterfeit money, besides what was so uttered or tendered, then such person so uttering or tendering the same shall be deemed and taken to be a common utterer of false money, and being thereof convicted, shall suffer a year's imprisonment, and shall find sureties for his or her good behaviour for two years more, *to be computed from the end of the said year; and if any person having been once so convicted as a common utterer of false money shall afterwards again utter or tender in payment any false or counterfeit money, to any person or persons, knowing the same to be false or counterfeit, then such person being thereof convicted, shall, for such second offence, be and is hereby adjudged to be guilty of felosy without benefit of clergy.

without benefit of clergy.

By the 5th sect. of the same statute, the prosecution must be commenced within aix months after the offence committed. See the modern cases on this subject collected in Carr. Supp. C. L. 219.

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WORCESTER ASSIZES.

(Civil Side.)

BEFORE MR. BARON GARROW.

DOE, on the demise of NUTT, Widow, v. NUTT.

Ejectment does not lie for dower which has not been assigned.

This ejectment was brought by the lessor of the plaintiff, who was the widow of a person who had been seised in fee of the premises in question. She, in the first intsance, relied on her husband's will in her favor; but, in answer to this, the defendant showed a conveyance in fee by the husband, in his life-time, to him.

Campbell, for the lessor of the plaintiff. I submit, that as the husband could only convey, subject to his wife's inchoate right to dower, we are still entitled

to recover one-third of the estate.

Garrow, B. I am clearly of opinion, that an ejectment does not lie for dower before it is assigned.

Nonsuit.

Campbell, and Godson, for the lessor of the plaintiff. Russell, for the defendant.

[Attornies—Croad, and Holdsworth.]

*Ejectment can only be maintained where the party has a right of entry: and if such party either has no right of entry, or it has been tolled, an ejectment cannot be supported. Lord Coke says, 1 Inst. 32 (b), "This great disadvantage the wife hath, that she cannot enter into her dower by the common law, but is driven to her writ of dower to recover the same."

The mode of recovering dower at law is by a writ of dower unde mihil habet, or by a writ of right of dower; but, if either of these remedies is resorted to, the writ of dower unde mihil habet is much to be preferred, because, by the stat. of Merton, the dowress recovers damages for the non-assignment of her dower, which damages may be assessed either by the Jury trying the case, or on a writ of inquiry. Ca. Temp. Hard. 19. In Jenk. Cent. 1, Ca. 85, it is laid down, that, "Regularly, where a husband die seised, the wife shall recover her dower with damages, for the whole time after her husband's death, but, if he does not die seised, after her demand, and the tenant's refusal to assign ber dower, she shall recover damages from the time of the refusal." However, in I Inst. 32 (b), Lord Coke says, "It is necessary for the wife, after the decease of her husband, as soon as she can, to demand her dower, before good testimony: for, otherwise, she may, by her own default, lose the value after the decease of her husband, and her damages for the detaining of her dower; for if she bring a writ of dower against the keir, and the heir cometh into the Court upon the summons on the first day, and plead that he has been always ready, and yet is, to render dower, &c., if the wife hath not requested her dower, she shall lose the mesme values and her damages; but if she hath requested her dower, she may plead it, and issue may be thereupon taken." And the case of Dobsen v. Dobsen, Ca. Temp. Hard. 19, and 2 Barnard. K. B. 180, accords with that. "The damages in these cases are according to the value, not of the land, but of the rent." Hale, MSS. Co. Litt. 32 (b), note 5.

If the demandant recovers damages in a writ of dower unde mikil kebet, she recovers costs; but if no damages are recovered, she is not entitled to costs. 2 Wms. Saund. 45. The learning on this subject will be found at large in 2 Wms. Saund. 42 m. et seq., and the Precedents in 3 Chitty Plead. tit. Proceedings in Dower. In a writ of right of dower, no damages are recoverable. Co. Litt. 32 (b.) These are the modes of recovering dower

at law.

In equity, bills are filed by dowresses to obtain their dower; but, to avoid objection to the jurisdiction, it is prudent also to pray a discovery of deeds or the like. That was so

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in the case of Moor v. Black, Cas. Temp. Talb. 126; and Lord Chancellor Talbot compelled the discovery and the assignment of dower. In the case of Curtis v. Curtis. 2 Bro. Ch. Ca. 620, where the title to the dower was denied, the Lord Chancellor Bathurst ordered the bill to be retained, with liberty to the plaintiff to try her right to dower *432] **at law; and the widow having established her right at law, Lord Alvanley decreed her the relief prayed. In the case of Mundy v. Mundy, 2 Ves. junr. 129, Lord Longhborough lays down, that if a legal title, such as dower, is controverted, it must be made out at law; but a Court of Equity will act in aid of the title.

POWELL and Wife v. HODGETTS, CUTLER, CHETWYN, and UNDERHILL.

If A, imprison B,, and, in continuation of that imprisonment, A, deliver B, into the charge of C, who keeps B, in custody, the acts and declarations of C, are evidence against A, in an action for false imprisonment.

Assault, and false imprisonment: Plea-Not Guilty.

It appeared that the defendants, Cutler and Chetwyn, seeing the plaintiff's wife digging potatoes in a field, went up to her, saying, that she had no right to dig there; they then took her into custody, and delivered her over to the defendant Underhill, who was a constable by whom she was detained for two days, and then allowed to depart.

The plaintiff's counsel proposed to give evidence of the declarations of the

defendant Underhill.

Ludlow, for the defendants. I submit, that as the plaintiff has proved a distinct imprisonment as against Cutler and Chetwyn, he can only recover as against them; and that being so, he cannot go into any thing that is either said or done by Underhill in their absence.

C. Phillips, and Godson, contra, argued, that they were at liberty to go through the whole of the facts of the imprisonment, as long as the imprisonment continued, although they could only recover against particular parties.

Garrow, B. It is quite clear, that a plaintiff who brings an action for false

imprisonment, against several defendants jointly, may either recover against all for any joint act of imprisonment committed by the whole of them, or may give evidence of an act of imprisonment committed by one, two, or more of the number, and recover against such defendant or defendants only; but it has been truly stated by the counsel for the defendants, that if a plaintiff proves a distinct imprisonment by two only of the defendants, he cannot go on, after that, to affect the others, and recover against the whole number; and for this reason, the damages being joint against all, the latter defendants would be liable to pay for an act, with the commission of which they had nothing to do. I therefore think, in the present case, that the plaintiff, having proved a distinct imprisonment by Cutler and Chetwyn, cannot recover against either of the others: but I think the acts and declarations of Underhill are evidence in this way. The defendants Cutler and Chetwyn, when they had themselves taken and imprisoned the plaintiff's wife, delivered her over to Underhill. Now that was a mere continuation of the imprisonment by them, and being so, I am of opinion, that the acts and declarations of Underhill are evidence against them; and I take it, that, in all cases, where one person puts a party into the custody of another, what is said and done by that other, is evidence against the person placing the party in custody, though said or done in his absence.

The evidence was received.

Verdict for the plaintiffs, against Cutler and Chetwyn,— Damages, 101.

Verdict for the defendants, Hodgetts and Underhill.

C. Phillips, and Godson, for the plaintiffs. Ludlow, for the defendants.

[Attornies-Elkington, and Hayes.]

See the case of Wright v. Court, ante, p. 232.

*STAFFORD ASSIZES.

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(Crown Side.)

BEFORE MR. BARON GARROW.

REX v. JAMES HASSALL and SARAH HASSALL.

If a man and woman be jointly indicted for a larceny, the latter as a single woman;—it is not sufficient to entitle her to an acquittal on the ground of coercion, to prove both jointly committed the offence, and that she had lived with the man for two years, and was reputed his wife; but such evidence must be given as to satisfy the Jury that the prisoners are in fact married persons, although it is not absolutely necessary to prove the actual marriage of the parties.

The prisoners were indicted (the latter as a single woman) for stealing a 20l. bank note, and a 5l. bank note, the property of Edward Fetherstone. It appeared, that the prosecutor met the two prisoners on the road leading to Wolverhampton, and after proceeding a short distance, the prosecutor and the female prisoner retired together into an adjoining field, where the prosecutor had an improper connexion with her. The male prisoner, who was spoken of both by the prosecutor and herself as her husband, waiting all the while in the road. On their return, the prosecutor said, that, on their return, he "paid the husband a shilling, which was his charge." The parties, after that, supped together; and the prosecutor lost his money, of which the 5l. note was found on the male prisoner, and the 20l. note on the female. On the cross-examination of the prosecutor, and the constable who apprehended them, it appeared that the prisoners, during the time they were seen by those witnesses, spoke of and treated each other as husband and wife; but those witnesses never saw them, except on the present transaction.

For the prisoners, a witness was called, who had known them for two years, and he proved, that during that time they lived together, and passed as husband and wife, and were reputed to be so. But this witness stated, on his cross-examination, that he did not know when or where they had been married.

Carrington, for the prisoners, contended, that on this *evidence the female prisoner must be acquitted. The proof was clear that the felony was committed by them jointly; and if this evidence adduced was sufficient proof that they were husband and wife, the female prisoner, as the wife, was entitled to be acquitted, on the ground of coercion. In the case of Morris, Esq., v. Miller, Esq., 4 Burr. 2058, it was laid down by my Lord Mansfield, that the only cases in which it was necessary to prove an actual marriage, were pro-

secutions for bigamy, and actions for criminal conversation; and that, in all other cases, evidence of reputation and cohabitation were sufficient presumptive

proof of marriage.

GARROW, B. These parties are not indicted as husband and wife; and I think, under the whole of the circumstances of this case, that the evidence of the marriage is by no means sufficient. I quite agree with my Lord Mansfield, that the two cases mentioned are the only cases in which it is necessary to give direct proof of an actual marriage; but it should be observed, that what evidence would be sufficient in other cases was not the point directly to be determined in the case of Morris v. Miller. Indeed, if the doctrine now contended for by the learned counsel were to prevail, it would be a never-failing recipe for all the hedge-tinkers about the country; for, without passing themselves off as being married, such persons would hardly find admission into the meanest lodging-house in the kingdom. And I take it, that though, in cases of this kind, it is not absolutely necessary to give direct proof of an actual marriage, yet such evidence must be adduced as to satisfy the Jury that the parties are in fact husband and wife, in the same way as to convince them of any other fact which they are to find. With regard to the evidence in the present case, the testimony of the constable and the prosecutor is only that of two *strangers, who are wholly ignorant on the subject; and the other wit-*436] *strangers, wno are wholly ignorant on the case, as his had and a specimen, were living together, and thought proper to pass as husband and If the parties, however, be really married, and will make a proper application to the Secretary of State, supported by proof of the marriage, they will sustain no injury by the want of evidence before me.

Verdict-Guilty.

Male, for the prosecutor. Carrington, for the prisoners.

[Attornies, —, and Passman.]

The case of Morris, Esq., v. Miller, Esq., 4 Burr. 2057, was an action for criminal conversation with the plaintiff's wife, and the actual marriage of the plaintiff's wife could not be proved; a verdict was found for the plaintiff: and a motion had been made to enter a nonsuit on that ground: Sir Fletcher Norton and Mr. Stowe, on showing cause, said, "We proved articles between the man and his wife, made after marriage, for the settling of the wife's estate, with the privity of relations on both sides; we proved cohabitation, name, and reception of her by everybody as his wife, though we did not indeed prove it by any register, or by witnesses who were present at the marriage. In ejectment, four months ago, before Lord Mansfield, this sort of evidence was offered and received." Lord Mansfield.—"It certainly may be done so in all cases except two. One is in prosecutions for bigsmy, and this case is the other." If the female prisoner had been indicted as the wife of James Hassall, no evidence of marriage would have been necessary.

REX v. THOMAS ABGOOD et al.

An indictment charging that a prisoner "did feloniously and maliciously, with intent to extort money, charge and accuse A. B. with having committed the horrible and detestable crime, &c., and feloniously, &c., menace and threaten to prosecute the said A. B., &c.," is not good under the stat. 4 Geo. 4, c. 54, s. 5.

But if the indictment follow the statute, and the evidence be of a threat to prosecute, the

Judge will leave it to the Jury to say, whether that was not a threatening to accuse.

THE indictment stated, that the prisoners "did feloniously and maliciously, with intent to extort money, charge *and accuse Joseph Nock, with having committed the horrid and detestable crime, &c., not to be named. &c., with a certain mure, and did feloniously and maliciously, with intent to extort, &c., menace and threaten to prosecute the said Joseph Nock for the

said pretended offence.

Ludlow, for the prisoners. I submit, that the charge and accusation alleged to have been made by the prisoners, and the threat to prosecute on that charge, are not an offence within the terms of the stat. 4 Geo. 4, c. 54, s. 5. It is not within the words of that act of parliament, and is in substance a different offence. The act of parliament applies only to threatening to accuse prospectively, and not to a threat to prosecute a charge or accusation which had antecedently been made.

GARROW, B., (having conferred with Burrough, J.) My learned brother and myself are both of opinion, that this objection must prevail. If the indictment had followed the terms of the statute, and it had been proved that the prisoners threatened to prosecute Mr. Nock, I should have left it to the Jury to say, whether that was not a threatening to accuse him; but we think, that the offence laid in this indictment is not sufficiently charged under the statute. The prisoners must therefore be acquitted.

Verdict-Not Guilty.

Corbet, and Talfourd, for the prosecution. Ludlow, and Whateley, for the prisoners.

By the stat. 4 Geo. 4, c. 54, s. 5, it is enacted, that "if any person shall maliciously threaten to accuse any other person of any crime punishable by law with death, transportation, or pillory, or of any infamous crime, with a view or intent to extort or gain money, security for money, goods or chattels, wares or merchandize, from the person so threatened, or shall procure, counsel, aid or abet the commission of the said offences, or of any of them, every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for such term not less than seven years, as the Court shall adjudge, or to be imprisoned and kept to hard labor in the common jail or house of correction, for any term not exceeding seven years. And by the stat. 6 Geo. 4, c. 19, it is enacted, "that as well every crime now by law deemed infamous, as also every assault with intent to commit any rape, or the abominable crimes of sodomy or buggery, or either of those crimes, and every attempt or endeavor to commit any rape, or the said abominable crimes, or either of them; and also every solicitation, persuasion, promise, threat, or menace, offered or made to any person, whereby to move or induce such person to commit, or to permit the said abominable crimes, or either of them, shall be deemed and taken to be an infamous crime, within the meaning of the stat. 4 Geo. 4, c. 54."

This latter statute passed in consequence of the decision in *Hickman's* case, in which it was held, by the twelve Judges, that the making of overtures to commit sodomy was not, before this act, an infamous crime, because it did not subject the party to an infamous

punishment, or prevent his being a witness.

Having been engaged in the Civil Court at the time this case was tried, we are indebted for this note to the kindness of one of the counsel in the cause.

THE APOTHECARIES' COMPANY v. FERNYHOUGH.

If an instrument has been originally unstamped, but has been stamped on payment of the penalty; it is admissible in evidence, though the receipt for the penalty has been erased; provided it be proved that such receipt had been indorsed on it. It is not necessary to prove the commissioner's signature to such a receipt.

DEBT for penalties, for practising as an apothecary, without a certificate from the Apothecaries' Company.

The practising was proved. The defence was, that the defendant was in

practice on the 1st of August, 1815.

To prove this, articles of copartnership, between the defendant and an apothecary, named Sutton, executed on the 1st of June, 1815, were offered in evidence; these articles of copartnership had not been originally stamped, but they had since been stamped at the Stamp Office, on *payment of the penalty. It was proved, that they were sent to London for the purpose of being stamped, and were sent back stamped, and with the receipt for the penalty indorsed; but when the deed was put in, something that had been written on it, had been evidently erased, and no receipt for the penalty appeared.

It was stated, that the defendant had himself, incautiously, erased the receipt. Taunton, for the Company, objected, that this instrument was not admissible in evidence, for, by the terms of the stamp acts, instruments before inadmissible in evidence, for want of a stamp, were rendered admissible by the stamp being affixed, and the receipt for the penalty being produced. Now, as in this case no such receipt was produced, the instrument was not receivable in evidence. He further objected, that even if the receipt did appear on the back of the instrument, the handwriting of the signature of the commissioner of the

stamps should be proved.

BURROUGH, J. If there is proof that there was a receipt for the penalty, and for any sufficient reason it cannot be produced, I am of opinion that secondary evidence of it may be given; and in the present case, after the evidence that has been given relative to the receipt, I shall admit the articles of copartnership in evidence. As to the proof of the commissioner's signature to such a receipt, I have never heard it asked for, in the great number of years I have been connected with Courts of justice.

The evidence was received.

Verdict for the defendant.

Taunton, Russell, and Field, for the Company. Jervis, Campbell, and J. Jervis, for the defendant.

[Attornies-Hore & Bacot, and Bedson & Co.]

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*SHROPSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE BURROUGH.

(Who sat for Mr. Baron Garrow.†)

DOE on the demise of LLOYD v. PASSINGHAM.

It is no objection to a will more than thirty years old being read in evidence, that possession has not followed it, because the court cannot know how the will directs the possession to go, till it is made acquainted with the contents of the will, by its being read.

[†] Who had formerly been counsel in a case involving the same question.

664 Doe d. LLOYD v. Passingham. Ox. Cir. 1826 [440

If, in the year 1794, the present defendant in ejectment obtained a verdict for the premises in question: and the present lessor of the plaintiff (who was neither a party to that trial, nor claiming under any one who was so) introduce what passed at that trial, and go as to show that the verdict then proceeded on improper evidence; after this, the now defendant may give evidence of what deceased witnesses proved at that trial, with a view of showing that that verdict was a correct one.

EJECTMENT to recover one moiety of the manor and estate of *Hendur* in the county of *Merioneth*. This property had belonged to *Gwin Lloyd*, Esq., in fee, and the question really to be tried was, whether Mrs. *Passingham*, the mother of the defendant, Colonel *Passingham*, was the legitimate daughter of *Gwin Lloyd*.

The case as opened on the part of the lessor of the plaintiff, was this, that Gwin Lloyd, having married a lady named Hill, died without any legitimate child, and that, on his decease, his estates passed to his sisters Catherine and Mary Lloyd in fee. The present ejectment was brought to recover the moiety which had belonged to Catherine Lloyd; who died in the year 1789, and by her will devised the property in question to her sister Mary Lloyd for life, with remainder to John Lloyd for life, with remainder to his eldest son (the lessor of the plaintiff) in tail. After the decease of Catherine Lloyd, her sister Mary Lloyd was in possession of the whole estate; and she so continued till the year 1794, when an ejectment, in which the present defendant was lessor of the plaintiff, and Mary Lloyd defendant, was brought to recover the whole of the manor and estates of Hendwr, Colonel Passingham then claiming to be the legitimate grandson of Gwin Lloyd. At the trial of that ejectment, a register of Fleet marriages was produced, by which it appeared, that Gwin Lloyd had married a person named Elizabeth Taylor; and also the examined copies of two entries from the parish registers of the parish of St. Pancras, one of which purported to contain the entry of the burial of Elizabeth Taylor, under the name of Lloyd, and the other, the entry of the baptism of Elizabeth, the daughter of Gwin and Elizabeth Lloyd. This Elizabeth, the daughter of Gwin and Elizabeth Lloyd, was the same person who afterwards married Mr. Passingham, and was the mother of the now defendant Colonel On the trial of that case at Shrewsbury, before Mr. Justice Passingham. Heath, at the Summer Assizes of 1794, a verdict was found for the lessor of the plaintiff, the Jury thereby finding in favor of the legitimacy of Colonel A short time before Michaelmas Term, 1794, a deed was exe-Passingham. cuted by Mrs. Mary Lloyd, Mr. John Lloyd, Colonel Passingham, and his brother, Mr. Robert Passingham, by which (after reciting that Colonel Passingham's legitimacy had been established by the verdict) the two former, for certain considerations therein stated, confirmed the manor and estates to Colonel Passingham, who had continued in possession of them down to the present John Lloyd died in the year 1825, and the title of the lessor of the plaintiff then accruing, the present ejectment was brought. The lessor of the plaintiff now contended, that, at the trial in 1794, the Fleet register was improperly admitted in evidence,—that the two entries in the registers of &. Pancras were forged, and that the mother of Colonel Passingham was not the legitimate daughter of Gwin Lloyd.

For the lessor of the plaintiff, who claimed as the devisee of Catherine Lloyd, her will was tendered in evidence. It was dated 7th February, 1785. Copley, A. G., for the defendant. The execution of this will must be proved; I admit that it is more than thirty years old; but the case of Lord Rancliffe v. *Parkins,† only decides that the possession under a will more than thirty years old, renders it unnecessary to prove the execution of the will by witnesses. Now here, I contend, that the possession was not under

^{† 6} Dow, 202. In this case, Lord Eldon, in giving judgment in the House of Lords, speaking of the will of Sir T. Parkyns, made in 1735, says, "there is a circumstance with respect to the attestation, which deserves to be attended to; for your Lordships know.

the will, for the estate has been in the possession of Colonel Passingham; and besides that, it is opened that an agreement was entered into, by which it was admitted, that Catherine Lloyd's possession was a possession by

wrong.

Russell, on the same side. The agreement opened admits the possession of Catherine Lloyd to be wrongful, and our objection is, that if you propose to read a will, without calling the subscribing witness, you must show possession in conformity with it. Now here, Mary Lloyd had only a possession for five years, which, by the agreement, she admits to have been a wrongful one.

Taunton, contra. How is it to be shown that the possession has not gone under the will? Unless the will be read, you cannot say how it directs the possession to go. If the will is thirty years old, and comes from a proper repository, I take it, that it is not necessary to call any attesting witness; but supposing that it were necessary, and that the opening on the part of the lessor of the plaintiff is to be taken as correct, even then it stands thus: Catherine Lloyd left the property to Mary Lloyd and others for life, and then, under that disposition, Mary Lloyd is in possession for five years; that was a possession under the will; and neither she nor John Lloyd, the next tenant for life, could, by any act of theirs, prejudice the remainder-man, and if it were otherwise, tenants for life, for a sum of money, might give up the possession, and the remainder-man be barred.

Campbell, on the same side. We appear for the lessor of the plaintiff, whose title did not accrue till the year 1825, and the question now is, whether the will of Catherine Lloyd can be read. It should be observed, that the defendant's possession is not adverse to the will, because he was let into possession by those who took under it; and if a uniform possession under a will were necessary, a will would never be of any use, as the party, instead of wanting to prove his title to support an ejectment, would *be in possession of the estate. The question in the present case stands thus: the tenants for life, under this will, agree among themselves to let Colonel Passingham into possession; that they do by the deed; his possession being only under them, is still a possession under the will. It is clear, that as long as they lived, the possession of the defendant is only their possession, and he is in as their assignee.

Taunton. One fact appears to be decisive. In the deed of compromise it is stated, that Catherine Lloyd devised the estates, and the defendant thereby

that it is necessary that the three witnesses should sign in presence of the testator. They state here, that the testator signed it in their presence, but not that they signed in presence of the testator. But if it is proved, that they did actually sign in the presence of the testator. But if it is proved, that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will; but when the will is produced in a Court of justice, it is necessary that the proof should be made; and if it were necessary for the decision of the question, it would be sent to a Court of law, where a will, thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded, proves itself. But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing, though it should not be recorded."

In the case of M'Kenire v. Frazer, 9 Ves. 5, a will was, hy its date, more than thirty years old, and the testator had been dead more than twenty years. It had been proved on his death, and not since acted on. The handwriting of two of the witnesses was proved, but no account could be given of the third. Sir William Grant. M. R., said, "I do not see how a will can be distinguished from a deed, only that the former, not having effect till the death, wants a kind of authentication, which the other has. That is from the nature of the subject; but I think the proof sufficient in this case."

In the case of Calthorpe v. Gosgh, heard at the Rolls, 1789, 4 T. R. 707 (n. b.,) and 709 (n. †,) the will was not proved by witnesses: and it was said at the bar, that it was not necessary that it should be proved, it being above thirty years old; and the counsel mentioned a case of Mackery v. Newbolt, in which Sir Lloyd Kenyon, M. R., decided that a will, above thirty years old, should be read without pr state here, that the testator signed it in their presence, but not that they signed in pre-

666 Doe d. Lloyd v. Passingham. Ox. Cir. 1826. [444

admits the will, and then takes a conveyance from two of the devisees under it.

The Attorney General. A will thirty years old does not prove itself, unless possession has followed it. The part of the deed last alluded to by Mr. Tounton, only states that Catherine and Mary Lloyd entered on the estates as coheiresses of Gwin Lloyd, and that whereas Gatherine made her will, and, considering herself coheiress, devised to Mary Lloyd and John Lloyd as therein mentioned. There is nothing here to show that possession followed the will; indeed, at Catherine Lloyd's decease, Mary might have entered as heiress at law.

Burrough, J. The law appears to be laid down very strangely. After the will is read, it may be seen whether possession followed it, but that can hardly be known till it is read. Indeed, I don't see how the question can be raised, whether the possession of the estate has followed the will, till the Court is made acquainted with the contents of the will, by its being read; therefore, it must be read.

The will was read.

The counsel for the lessor of the plaintiff then proceeded to show what had occurred at the former trial.

*Evidence was given that the *Nisi Prius* record of the trial in 1794 had been searched for at the office of the Associate of the Circuit, (which was considered as the office where it would remain,) but that no judgment having been entered up by reason of the compromise, it could not be found.

Mr. Pownall, who was attorney for Mrs. Mary Lloyd, the defendant on

that trial, put in the issue delivered in that cause: and

Mr. Sandys, the then attorney of Colonel Passingham, being examined on the part of the lessor of the plaintiff, stated, that on the trial in the year 1794, two papers were proved and read, which purported to be examined copies of entries in the parish registers of St. Pancras, of the baptism of Elizabeth, the daughter of Gwin Lloyd, and of the burial of Elizabeth Lloyd, the supposed wife of Gwin Lloyd.

The Attorney General wished to ask him, whether, on that trial, Mr. Emanuel Williams, who was a witness for Colonel Passingham, did not depose to a declaration made by Gwin Lloyd, relative to the legitimacy of

Colonel Passingham's mother.

Taunton, for the lessor of the plaintiff. I must object to what deceased witnesses proved at the former trial being given in evidence now. That case was not between the same parties; for it was between Colonel Passingham and Mary Lloyd, who was a tenant for life; and the present case being between a remainder-man and Colonel Passingham, the evidence of deceased witnesses given on the former trial is not admissible now.

Campbell. If the lessor of the plaintiff was either party or privy, the evidence would be admissible; but our client was clearly not a party, nor is he a privy, as he does *not take by descent, but as a purchaser. Mary Lloyd [*446 was a mere tenant for life, and the lessor of the plaintiff has a distinct estate. Where the record would not be evidence, statements like the present would not; and the record is only admissible against parties or privies.

The Attorney General, contra. If we are not entitled to go into what took place on the former trial, the greatest injustice will follow. The other side introduce the former trial for their own purposes, and while they impeach the former verdict by showing certain bad evidence, on which they say it proceeded, they would shut out the other evidence, which would explain and support the finding of that Jury. I will take it, that we cannot give evidence of the former trial, unless the record would be evidence. But in cases where two parties claim under the same deed, a record, which is for or against one remainder-man, is evidence for or against another remainder-man claiming under the

same deed. This was held in the case of Pyke v. Crouch; and it is so laid down in Com. Dig. tit. Evidence (A. 5:) and I therefore contend, that the lessor of the plaintiff is privy in estate to Mary Lloyd and John Lloyd, because they all claim under the same deed.

Russell. The counsel for the lessor of the plaintiff opens, that there was a former trial, and that the verdict was then found on improper evidence, and he *447] goes into proof of that: *now, that must create a very unfair prejudice,

unless we go into the whole of what appeared at that trial.

Burrough, J. You cannot cross-examine Mr. Sandys as to the whole of

the evidence given on that trial, as all the witnesses may not be dead.

Russell. We should be able to get at the whole of the evidence by giving this sort of proof as to the evidence of those who are dead, and by calling the

living ones to give evidence now.

Taunton, in reply. We tender the evidence of the papers produced at the former trial, as of an act done by Colonel Passingham, who is the defendant on the present record; but our doing so does not let the other side into giving evidence of all his other acts. As to the other point, the case of Pyke v. Crouch goes only to this, that, between two successive remainder-men, a verdict for-or against one is evidence for or against the other. But there is a great difference between the evidence of a deceased witness and a verdict; and there is also the greatest difference between the case of one remainder-man in tail and another, and the case of a tenant for life and a remainder-man. The latter can, by no act of his own, destroy the remainder, while the former, by levying a fine, or suffering a recovery, can get the whole interest, and bar the other remainders.

BURROUGH, J. I think there is very great difficulty in the question, but I shall receive the evidence. At the former trial, Colonel Passinghum was lessor of the plaintiff, and produced the witness, Emanuel Williams, in support of his title. His possession is now attacked; and the other side introduce the former trial, to show that at that time a verdict was improperly obtained. As they have introduced a part of the evidence given at the former trial, *I must allow Mr. Sundys to be asked what the deceased witness then *448] said on his oath.

The evidence was received.

On the part of the defendant, the settlement made by Gwin Lloyd on his marriage with Miss Hill, was put in. This settlement was dated on the 12th March, 1748, and was between Gwin Lloyd of the first part, Sarah Hill of the second part, Sir Rowland Hill and John Gwynne, of the third part, and Sir Watkyn Williams Wynne, and Edward Lloyd, of the fourth part. By this settlement, which recited the intended marriage, the manor and estates in question were conveyed to Sir Watkyn Williams Wynne and Edward Lloyd in fee, "To have and to hold the same (after various limitations not material to this case) unto the said Sir W. W. Wynne and Edward Lloyd, their heirs and assigns, to the only proper use and behoof of the said Sir W. W. Wynne and Edward Lloyd, their heirs and assigns, to the use of the said Gwin Lloyd, his heirs and assigns for ever."

The defendant's counsel contended, that, under the terms of this settlement, Gwin Lloyd was only seised, at the time of his decease, of an equitable estate,

the legal estate being in the trustees.

^{† 1} Ld. Raym. 730, it was resolved, on a trial at bar, that, "if several estates in remainder be limited in a deed, and one of the remainder-men obtains a verdict for him in an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainder-man, in an action brought against him for the same land, though he does not claim any estate under the first remainder-man, because they all claim under

the same deed."

It is there stated, that a verdict for him in remainder shall be evidence for a subsequent remainder-man in the same deed; for though he does not claim under him for whom the verdict was, yet he claims by the same deed. And for this, 1 Ld. Raym. 730, is cited.

This point was reserved, the learned Judge giving no opinion upon it; and the case proceeded upon 'be simple question of the legitimacy of Colonel Passingham.

Verdict for the lessor of the plaintiff.

Taunton, Campbell, and Richards, for the lessor of the plaintiff.

The Attorney General, Russell, and E. V. Williams, for the defendant.

[Attornies—Pownall, and Roarke.]

*In the ensuing *Michaelmas* Term, *Russell* moved for leave to enter a nonsuit, on the ground, that, under the marriage settlement, executed before the marriage of *Gwin Lloyd* with Miss *Hill*, he was only seised of an equitable estate; but none of the points ruled by the learned Judge at the trial were questioned.

The Court granted a rule nisi on that point.

GLOUCESTER ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE BURROUGH.

REX v. WILLIAM SMITH, THOMAS SMITH, and SARAH SMITH.

There is no legal obligation on one brother to maintain another, so as to make the omission indictable.

If one has his idiot brother, who is helpless, as an inmate in his house, and omits to supply him with proper food, warmth, &c., he is not indictable for the omission.

If one has an idiot brother, who is bed-ridden in his house, and keeps him in a dark room, without sufficient warmth or clothing, this will not be an assault or an imprisonment, nor will proof of this support an indictment for an assault or an imprisonment.

The first count of the indictment stated, "that the defendants, unlawfully and maliciously contriving and intending to hurt and injure one George Smith, being an idiot, and under the care, custody and control of the said William Smith, Thomas Smith, and Sarah Smith, on the first day of January, 1825, and on divers other days, &c., with force and arms, at, &c., in and upon the said George Smith, then and there being such idiot, and under the care, custody, and control of the said W. S., T. S., and S. S., as aforesaid, did make divers assaults; and that the said W. S., T. S., and S. S., during all that time, at, &c., cruelly, unnecessarily, maliciously, and unlawfully, did keep, confine, and imprison the said George Smith, so being an idiot, and under the care, custody, and control of the said W. S., T. S., and S. S., in a certain dark, cold, and unwholesome room, part and parcel of a certain dwelling-house,

450] in the parish, &c., and during all that time, did *cruelly, unnecessarily, maliciously, and unlawfully neglect and refuse to give and administer, or permit to be given and administered to him the said George Smith, being so confined and imprisoned as aforesaid, sufficient meat, drink, victuals, clothes, and other necessaries proper and requisite for the sustenance, support, maintenance, and clothing of the body of him, the said George Smith, and did then and there keep the said George Smith, without sufficient and proper air, warmth, and exercise, necessary for the health of the said George Smith; by means of which said confinement and imprisonment, and also for want of such sufficient meat, drink, victuals, clothes, and other necessaries, warmth, air, and exercise, as were proper and requisite for the sustenance and support, &c., of the said George Smith; he, the said George Smith, on, &c., at, &c., became, and was for a long time, to wit, &c., weak, sick, ill, &c., and other wrongs, &c., against the peace, &c."

The second and third counts were similar, except that the former stated George Smith to be "a lunatic," and the latter, "a person of unsound intellect."

The fourth, fifth, and sixth counts were precisely similar to the first, second, and third, except that they stated George Smith to be "in the care, custody, and control of William Smith."

The seventh, eighth, and ninth counts, were like the fourth, fifth, and sixth. except that they omitted the allegation, that George Smith was "in the care, custody and control of William Smith," and did not state that he was in the care of any person.

The tenth count was for a common assault. Plea—General issue.

Taunton, for the prosecution, opened, that he was not in a condition to prove an actual assault by beating, but he should show gross mal-treatment; and it had been held, that exposure to the inclemency of the weather, and other *451] ill treatment of that sort, was sufficient to support an *indictment for an

assault; and he cited the case of Rex v. Ridley.†

From the evidence on the part of the prosecution, it appeared, that George Smith, who was upwards of forty years of age, had always been an idiot, and had been bedridden for some years; and that his father, at his decease, had left him an annuity charged on his real property. The defendants were the brothers and sister of George Smith; and in consequence of some information, the Rev. W. D. Broughton, a magistrate, and other persons, went to the house of William Smith, in the month of January, 1826, and saw the other defendants; they asked to see the idiot, and were told by Sarah Smith, in the presence of Thomas Smith, that he was locked up, and that W. Smith, who was absent, had the key. However, Mr. Broughton, and those who accompanied him, went up stairs, and on opening a door, which was not locked, they found George Smith on a bed of chaff, covered with a blanket and a great coat. The window of the room was bricked up, and the floor of it in a filthy state; and though the weather was extremely cold, there was no appearance that there had been any fire in the room. From this place, he was conveyed to the Stafford Lunatic Asylum, where his limbs were found to be in a contracted state, so that he could not stand or move about.

*Campbell, for the defendants. I submit that this indictment is not *452] supported. There is no actual assault proved. It should be observed,

^{†2} Camp. 650. In that case, the indictment was for wilfully omitting to provide sufficient food, &c., for E. W., the said E. W. being a servent of the defendant, and for exposing the said E. W. to the inclemency of the weather. Lawrence, J., held, that the indictment, so far as regarded the omitting to provide sufficient food, &c., could not be supported, as it did not allege E. W. to be of tender years, and under the control and dominion of the defendant. And his Lordship cited a case which had been tried before Le Blanc, J., where a majority of the Judges had been of that opinion; but Mr. Justice Lawrence said, that as a the exposure to the weather, that was an act in the nature of an assault, for which the lefendant might be lighle whatever the are of the servent might be. However, that mark defendant might be liable, whatever the age of the servant might be. However, that part of the charge could not be made out in evidence.

that the indictment in the case of Rex v. Ridley, did not charge any thing like en assault; but only a malicious non-feasance, and a positive exposure to the inclemency of the weather, contrary to the defendant's duty. But here, the assault which is charged is not proved, and all the rest of the indictment is mere matter of non-feasance. The present indictment states, that this idiot was in the care, custody, and control of the defendants. Now a child is in the care of its parent, and that raises a duty to provide for it; but the relation of brother and brother, does not raise any such duty, and, for this purpose, the parties were absolute strangers. How can George Smith be said to be under the care, custody, or control of either of the defendants? An idiot may be as helpless as a child of tender years; but George Smith was more than twenty-one years of age; and there is nothing to show, that there was a duty raised in any other to take care of him. The indictment alleges, that they kept him in a dark unwholesome room, and neglected and refused to administer to him sufficient meat, drink, &c., for his support, and did keep him without proper air, &c. All this is non-feasance, and there is not the slightest evidence of mal-feasance, and, certainly, no evidence of any assault. There may be evidence that he was not properly taken care of. If he had been found a lunatic, and the defendants had been his committees, that would raise a duty in them to take care of him. But if a person is alleged to be an idiot, it may be the duty of his nearest relations to take care of him; but that would be, what the moralists call a duty of imperfect obligation. 'To support any of the counts except the last, it must be shown, that either by contract or by law, there was a duty in the defendants to maintain and take care of their brother. If they did not maintain their brother, could any action be brought against them? Certainly not. Now, can there be a case of *any breach of duty, where no action is maintainable. duty can only arise by contract or by act of law. The former, there is no pretence for, and as to the latter, he was not their child, nor were they his committees.

Whateley, on the same side. To support this indictment, it is not sufficient that there should be a moral obligation in the defendants to maintain this unfertunate person, but there must be a legal one, such as arises from the relation of

parent and child, or husband and wife, or master and servant.

Taunton, for the prosecution. This indictment states, that George Smith was an idiot, and was under the care, custody, and control of the defendants. Now that is a question of fact; and if so, must be left to the Jury. This prosecution is not founded on the case of Rex v. Ridley, but on the common law. In the case of Rex v. Ridley, Lawrence, J., held the indictment bad, for want of the allegation that the servant was of tender years. Now, here it is alleged, that the party was an idiot; and an idiot is as much in the care and protection of others, as a child of tender years. With respect to the indictment not being supportable, because it charges only acts of omission, has Mr. Campbell forgotten the case of Charles Squires, who was tried for murder, caused by omitting to give an apprentice food. He was found guilty, and executed for that omission. It is said, in this case, that there was no legal obligation on the defendants. I submit that there was; and unfortunate would be the situation of such wretched beings if there were not. A brother may not be bound to take care of a brother, if the father be living; but if two brothers and a sister have received as an inmate, another brother who is an idiot, and have, in point of fact, that brother under their care and control, though this was in the first instance voluntary, the law throws on them the necessity of taking proper care The *facts here show, that this idiot was in the care, custody, and control of the defendants, because he was secured in a room in their house, which he could not get out of; and it is in evidence, that two of the defendants said, they had him locked up there. This was a positive act, and more than an act of omission. It proved literally, that he was in their custody and control. If having him in that room fastened up, is not a having him

in their control, it is hard to say what would be. This is like the case of a voluntary bailee. He would not be compellable to take charge of the goods at all, but if he did become a bailee, he would be liable, if they were lost through his neglect. We do not indict them for neglecting to maintain him, but we charge, that they have had him in their custody, and have not treated him pro-

perly.

Russell, on the same side. The indictment states, that George Smith was in the care, custody, and control of the defendants. The question, therefore, is, whether that is proved. It appears that he was helpless, and secured in a room, and when persons wanted to see him, they looked for the key of his room. If a man cannot take care of himself, he must be in the care of some one. Now, in whose care was this person? In the care of those in whose house he was locked up. Mr. Campbell has said, that there is no legal obligation between brother and brother. Suppose a father to die and leave two sons, one thirty years old, the other two; and if, by the neglect of the elder, the younger died while residing in his house, would he not be answerable for murder? Indeed, if it were not so, any one on whom the care of a lunatic or infant brother devolved, might get his money improperly, and then starve him to death with impunity. The seventh, eighth, and ninth counts, at all events, are proved. They are for assaults; and to constitute an assault, it is not necessary that there should be a striking. That was held in the cases of Rex v. Nichol, and Rex *455] v. Rosinski, which were cases of *indecent conduct of the prisoners towards females;† and the case of Rex v. Ridley was more like the present, as a part of the charge there was, for depriving the party of proper warmth.

Campbell. Ridley's case was not for depriving the party of warmth, but was for a mal-feasance in exposing her to cold.

Taunton. From the whole context it appears, that the exposure in that case was not by an act done, but only by omission.

Russell. I shall further contend, that if a person is fastened up in a room, that is, in law, an assault.

Campbell, in reply. The question is, whether there was a legal obligation on the defendants; for mere non-feasance is only indictable when there is a liability and a neglect of a duty. In mal-feasance, a positive act is done. Mr. Justice Lawrence made the distinction in the broadest way, in the case of Rex v. Ridley. In that case, there was non-feasance and mal-feasance, and the learned Judge expressly distinguishes between the two. The defendants are said to have had George Smith in their care, custody, and control; now there is no evidence that they were his committees, or that they were under any legal liability to maintain him. And further, how does it at all *appear, that they had any right to prevent his going away? If the people at the Lunatic Asylum had persuaded George Smith to leave the house, the defendants could have brought no action against them for getting him away. So far from that, could not the defendants have carried him to the workhouse? Nay, if they had been hard-hearted enough, they might have insisted on his going there. In the present case, there is nothing like an assault proved.

† In the case of Rex v. Nichol, Russ. & Ry. C. C. R. 130, the prisoner was indicted for an assault: he was a schoolmaster, and took indecent liberties with a female scholar,

for an assault: he was a schoolmaster, and took indecent liberties with a female scholar, of the age of thirteen, without her consent, though she did not resist; and the twolve Judges held, that this was sufficient to support a count for a common assault.

The case of Rex v. Rosinski, Ry. & M. C. C. R. 19, was that of a person who pretended to be able to cure all disorders; and being consulted by a female, he took off all her clothes, (she being unwilling that he should do so,) under pretence of curing her of fits: and the twelve Judges held, that this was an assault.

It is worthy of remark, that the stat. 43 Elis. c. 2, which enacts, that the father, grandfather, mother, grandmother, and children of a poor person being of sufficient ability, shall maintain such poor person, under penalty of 20c. for every month they shall fail to do so, does not extend to one brother maintaining another. So that, if a man were in a workhouse, his brother would not be compellable to contribute any thing towards his upport, however able to do so. upport, however able to do so.

The cases of Nichol and Rosinski were both cases of an act done; but here there is not the slightest evidence of any act done by the defendants; and mere non-seasance can only become a crime when there is a breach of a legal duty

Burrough, J. I am clearly of opinion, that, on the facts proved, there is no assault and no imprisonment in the eye of the law, and all the rest of the charge is non-feasance. In the case of Squires and his wife for starving the apprentice, the husband was convicted, because it was his duty to maintain the apprentice, and the wife was acquitted, because there was no such obligation on her. I expected to have found in the will of the father, that the defendant were bound, if they took the father's property, to maintain this brother; but, under the will, they are only bound to pay him 501. a year, and not bound to William Smith appears to have been the owner of the house, maintain him. and Thomas and Sarah were mere inmates of it, as their idiot brother might be: as to these latter, there could clearly be no legal obligation on them; and how *can I tell the Jury that either of the defendants had such a care of this unfortunate man as to make them criminally liable for omitting to attend to him? There is strong proof that there was some negligence; but my point is, that omission, without a duty, will not create an indictable offence. There is a deficiency of proof of the allegation of care, custody, and control, which must be taken to be legal care, custody, and control. Whether an indictment might be so framed as to suit this case, I do not know; but on this indictment, I am clearly of opinion, that the defendants must be acquitted.

Verdict—Not Guilty Taunton, and Russell, for the prosecution.

Campbell, Whateley, and Talfourd, for the defendants.

[Attornies-Keen, and Flint.]

NORFOLK SUMMER CIRCUIT.

1826.

BEFORE LORD CHIEF JUSTICE BEST, AND MR. JUSTICE BAYLEY.

BUCKS ASSIZES.

BEFORE MR. JUSTICE BAYLEY.

REX v. HAZY and COLLINS.

Two persons were indicted on the 6 Geo. 3, c. 36, for lopping and topping an ash timber tree, without the consent of the owner. The owner died before the trial, having first given orders for the apprehension of the prisoners on suspicion. The offence was committed at 11 o'clock at night, and the prisoners, when detected, ran away. The land-steward of the owner proved, that he had not given any consent, and did not believe that his master had:—Held, that this was evidence from which the Jury might infer, that no consent had been given by the owner.

INDICTMENT on the stat. 6 Geo. 3, c. 36,† for lopping and topping an ash timber tree, "without the consent of the owner." The owner (Sir J. Aubrey) had died before the trial. The offence was committed at 11 o'clock at night on the 18th February. Sir J. Aubrey died on the 1st of March following, having given orders for apprehending the prisoners on suspicion.

The land-steward was called to prove, that he himself never gave any consent; and, from all he had heard his master say, he believed that he never did

BAYLEY, J., told the Jury, that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, (namely, Sir *459] J. Aubrey,) that they *might lop and top it; and left it to them to say, whether they thought there was reasonable evidence to show that in fact he had not given any such permission. His Lordship adverted to the time of night when the offence was committed, and to the circumstance of the prisoners' running away when detected, as evidence to show, that the consent required had not in fact been given.

Verdict-Guilty.

Dover, for the prosecution.

[†] This statute enacts, "that every person who shall, in the night time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away any cak, beech, ash, elm, fir, chesnut, or sap timber tree, or other tree standing for timber, or likely to become timber, without the consent of the owner or owners thereof first had and obtained," shall be deemed guilty of felony, and punished with transportation for seven years.

REX v. ----

If the only evidence against a prisoner indicted for larceny be, that the goods were found in his possession sixteen months after they had been stolen, the Judge will direct an acquittal, without calling on him for his defence.

LARCENY. Goods, which had been lost sixteen months before, were found in the house of the prisoner. This was the whole of the evidence

against him.

BAYLEY, J. The rule of law is, that if stolen property be found, recently after its loss, in the possession of a person, he must give an account of the manner in which he became possessed of it, otherwise, the presumption attaches, that he is the thief; but I think, that after so long a period as sixteen months had elapsed, it would not be reasonable to call upon a prisoner to account for the manner in which property supposed to be stolen came to his possession.

Verdict—Not Guilty.

*CAMBRIDGE ASSIZES.

F*460

BEFORE LORD CHIEF JUSTICE BEST.

PERCIVAL, Clerk, v. COOKE et al., Executors of MAULE, Clerk.

Dilapidations. The executors of a deceased incumbent are not bound to put the rectory house into a finished state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely neceasary for the preservation of the premises. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber, in the estimate of dilapidations due from them.

Case for dilapidations. Plea—General issue.

This action was brought by the plaintiff, as Rector of Horsheath, in the county of Cambridge, against the defendants as the executors of the late incumbent, who died on the 25th of January, 1825. The plaintiff claimed 784l. for the dilapidations of the rectory house. A witness, called for the plaintiff, stated, that considerable repairs had been made since the incumbency of the plaintiff; but, on his cross-examination, it appeared, that those repairs had been so made with timber to the value of 60l. or 70l., which had been cut down by the plaintiff, but which had been growing on the glebe in the time of the late incumbent.

Dover, and Kelly, contended, that the defendants were entitled to be allowed for this, because, if the late incumbent had effected these repairs in his lifetime, he would have been entitled to have cut down this timber, and have used

it in the repairs.

BEST, C. J. I am of opinion, that the defendants are entitled to an allow-

ance for this timber, in the estimate of the repairs.

A surveyor proved, that he had examined the premises, and that the dilapidations amounted to the sum of 7841. On his cross-examination, he said, that nothing had been pulled down on the premises that he knew of, and that he

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*461] had made his valuation on the principle, that the premises *ought to be put into thorough repair, fit for the occupation of a gentleman. He further stated, that he had included in that sum the expense of painting the rectory house twice in oil on the inside, and three times on the outside; and also the expense of taking off and renewing the old tiling, and old lead of the roof; and further, as the windows were all in bad condition, and old fashioned, he had included the expense of putting in new windows in the modern style.

Brer, C. J. Did you make your estimate on the principle, that the present incumbent was to walk into premises in a complete and finished state of

repair?

The witness. I did, my Lord.

BEST, C. J. This is entirely wrong. The surveyor has gone on the principle that the representatives of the late incumbent are bound to do every thing to the premises which an in-coming tenant would do. That is not law. They, are bound to do no more than ought to be performed by an out-going tenant. On this principle the valuation ought to have been made. The present estimate, is worth nothing.

In answer to a question by his Lordship, what would be the difference

between valuations made on those two principles, the witness stated about 300l. Bref. C. J. (To the plaintiff's counsel.) You had better make some arrangement, otherwise it will be my duty to tell the Jury that the defendants are not bound to pay that part of the estimate which relates to the putting of the premises into a finished state of repair. The executors of a deceased incumbent are, in fact, bound to do nothing more than to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises.

Verdict for 4001. by consent, being 3841. less than the sum claimed.

Storks, and Pryme, for the plaintiff. Dover, and Kelly, for the defendants.

[Attornies, —, and Egan & W.]

For the report of this case we are indebted to the kindness of one of the counsel engaged in it.

SUFFOLK ASSIZES.

BEFORE MR. JUSTICE BAYLEY.

DOE, on the demise of TINDALE, v. HEMMING et al.

In ejectment by an heir at law, against a defendant who claims under a lease granted by an ancestor of the lessor of the plaintiff; if such lease, being in the hands of the lessor of the plaintiff, be produced at the trial by him on notice, it may be given in evidence, without proof of its execution by the subscribing witness.

EJECTMENT by an heir at law, against the defendants, who were stated to be the tenants of a person who claimed as devisee under a will; and this ejectment was brought for the purpose of trying the validity of that will.

The lessor of the plaintiff having proved a prima facie title, as heir at law, the counsel for the defendants stated, that a lease had been granted by the devisor (who was an ancestor of the lessor of the plaintiff, and through whom he derived his title) to the defendants, which was still unexpired; and as that lease took the right of possession out of the lessor of the plaintiff, it would preclude him from recovering in this action, whether the will were valid or invalid. It was, however, suggested, that the lease had found its way into the hands of the lessor of the plaintiff, who being called upon to produce it, (notice having been duly given,) did accordingly produce it. The instrument appeared to have been executed in the presence of a subscribing witness, who was not in attendance.

*The counsel for the defendants proposed to read the lease, without proving it by the subscribing witness.

Storks, and Robinson, for the lessor of the plaintiff, objected to the reading

of the instrument without such proof.

Dover, and Kelly, for the defendants, contended, that the lease coming out of the hands of the heir at law, who claimed an interest in the land, must be taken to be good as against him, so as to dispense with proof of its execution.

BAYLEY, J. I am of opinion, that an heir at law producing a lease granted by an ancestor, under whom he claims, although it is to be used as evidence against his right to present possession of the land, is estopped from disputing the due execution of the instrument. It is therefore unnecessary for the defendant to call the subscribing witness.

Nonsuit.

Storks, and Robinson, for the lessor of the plaintiff. Dover, and Kelly, for the defendants.

In the ensuing Term, Storks moved to set aside the nonsuit; but the Court of King's Bench refused the rule.

*NORFOLK ASSIZES.

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BEFORE LORD CHIEF JUSTICE BEST.

SLY v. STEVENSON.

A warrant under the stat. 6 Geo. 4, c. 16, s. 29, to search for the goods of a bankrupt in the house of a third person, is not valid, if granted to any one except the messenger under the commission.

A constable, who delivers a copy of his warrant to the party grieved, cannot thereby discharge himself, unless the party has thereby a right of action (supposing the warrant illegal) against the magistrate under whom he acts.

TRESPASS for breaking and entering the plaintiff's house, and seizing his goods. Plea—General issue.

The defendant was a constable, and having been directed by the assignee under a commission of bankrupt against the father of the plaintiff, to procure a warrant to search the plaintiff's house for property of the bankrupt, supposed to be fraudulently concealed there, went to the office of a magistrate at Norwick, and obtained in his absence from one of his clerks an old warrant issued for a similar purpose, about a month previously, directed to another constable, and by him executed and returned. The defendant having struck out the name of the former constable, and inserted his own in the warrant, without any authority from the magistrate, proceeded to the house of the plaintiff, and committed the trespass in question.

Robinson, for the defendant, having proved a strong case of fraud between the plaintiff and his father, the bankrupt, and shown, that most of the goods seized had been secretly conveyed from the bankrupt's house, and mixed up with the stock of the plaintiff, contended, that the defendant on the whole of the facts was entitled to a verdict, he having, before action brought, given the

plaintiff a copy of the warrant, pursuant to the 24 Geo. 2, c. 44.

Kelly, and Gunning, for the plaintiff, submitted, that the clause of the new safety bankrupt act, (6 Geo. 4, c. 15, s. 29,)† *under which the warrant had originally been obtained, authorised a magistrate to grant such a warrant to no other person than the messenger under the commission, and consequently, that the defendant could not protect himself under the bankrupt act, even supposing the warrant to have been regularly issued. But they also urged, that this warrant had been obtained under circumstances, which, assuming it to be illegal, gave no right of action against the magistrate; and consequently, that the defendant was liable, although a constable, and acting under a warrant de facto.

BEST, C. J. I am of opinion, that on both grounds the plaintiff is entitled

to recover.

Verdict for the plaintiff, with nominal damages.

His Lordship refused to certify, to deprive the plaintiff of his costs, in consequence of the misconduct of the defendant in obtaining the warrant.

Kelly, and Gunning, for the plaintiff. Robinson, and Evans, for the defendant.

† That section is as follows: "That in all cases where it shall be made to appear to the satisfaction of any justice of peace in England or Ireland, that there is reason to suspect and believe that property of the bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such justice of peace is hereby directed and authorised to grant a search warrant to the person so deputed by the commissioners as aforesaid. And it shall be lawful for such person to execute the same in like manner; and such person shall be entitled to the same protection as is allowed, by law, in execution of a search warrant for property reputed to be stolen and concealed." From s. 27, it appears, that the person alluded to as the person "deputed by the commissioners," is the messenger.

BACK v. STACEY.

(Special Jury.)

To constitute an illegal obstruction, by building, of the plaintiff's ancient lights, it is not sufficient, that the plaintiff has less light than he had before; but there must be such a privation of light as will render the occupation of his house uncomfortable, and prevent him, if in trade, from carrying on his business as beneficially as he had previously done.

THE was an issue directed by the Lord Chancellor to try, First, whether the ancient lights of the plaintiff in his dwelling-house in the city of Norwich

The lessor of the plaintiff having proved a prima facie title, as heir at law, the counsel for the defendants stated, that a lease had been granted by the devisor (who was an ancestor of the lessor of the plaintiff, and through whom he derived his title) to the defendants, which was still unexpired; and as that lease took the right of possession out of the lessor of the plaintiff, it would preclude him from recovering in this action, whether the will were valid or invalid. It was, however, suggested, that the lease had found its way into the hands of the lessor of the plaintiff, who being called upon to produce it, (notice having been duly given,) did accordingly produce it. The instrument appeared to have been executed in the presence of a subscribing witness, who was not in attendance.

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Nonsuit

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In the ensuing Term, Storks moved to set aside the nonsuit; but the Court of King's Bench refused the rule.

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BEST, C. J. I am of opinion, that on both grounds the plaintiff is entitled

to recover.

Verdict for the plaintiff, with nominal damages.

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(Special Jury.)

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Times was an issue directed by the Lord Chancellor to try, First, whether the ancient lights of the plaintiff in his dwelling-house in the city of Norwich

had been *illegally obstructed by a certain building of the defendant. [*466 And, Secondly, If the first issue should be found in the affirmative,

what damage the plaintiff had sustained in respect of the injury.

A great many witnesses, including several surveyors of eminence, were examined on both sides; and it was evident, that the quantity of light previously enjoyed by the plaintiff, had been diminished by the building in question. Under these circumstances, it was contended for the plaintiff, that he was at all events entitled to a verdict on the first issue, any obstruction of

ancient lights being wrongful and illegal.

BEST, C. J., told the Jury, who had viewed the premises, that they were to judge rather from their own ocular observation, than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grover) on the premises, as beneficially as he had formerly done. His Lordship advect that it might be difficult to draw the line, but the Jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises.

The Jury found for the defendant on both issues

Storks, Robinson, and Rolfe, for the plaintiff.

Kelly, and Gunning, for the defendant.

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

SECOND SITTINGS AT WESTMINSTER, IN MICHAELMAS TERM, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

WILSON v. GALLATLY.

If, in assumps it for work and labor, the defence be that A. B. was employed to do the work and not the plaintiff. A. B. is a competent witness to prove this, although he is an uncertificated bankrupt, and his assigness have received the amount due for this very work as work done by him.

Assumpsir for work and labor. Plea—General issue. For the plaintiff it appeared that he had done work as a glazier at the house of the defendant; and that the defendant had promised to pay him.

The defence was, that a person named Flewer had been employed to do this work, and that the plaintiff was employed by him and not by the defendant; and that Flewer having become bankrupt, his assignees had been paid by the defendant for the work in question.

To prove this Flewer was called. He stated that he had not obtained his certificate.

Brougham, for the plaintiff. He is, I submit, not a competent witness, because if the plaintiff recovers in this action, the witness having no certificate, will be liable to repay the defendant, on the ground that the amount has been already paid to his assignees by mistake.

*ABBOTT, C. J. I don't see how that money could be recovered back; and further, I think that the judgment in this action would not be evi-

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dence in an action against his assignees, to recover back the money, because it is between other parties.

The witness was examined.

Verdict for the plaintiff.

Brougham, and Thesiger, for the plaintiff. Denman, and Archbold, for the defendant.

[Attornies—Hooper, and Branscomb.]

HEWET et al. v. GOODRICK.

If after a bill of exchange has been dishonored and notice of dishonor duly given, the holder take part of the amount of the acceptor, and offer to take a warrant of attorney to secure the payment of the residue by instalments, which offer is not accepted—This is not such a giving of time to the acceptor as will discharge the drawer. But if the holder had disabled himself from suing on the bill, it is otherwise.

Assumestr by the plaintiffs as payees of a bill of exchange for 1101., drawn by the defendant and accepted by a person named *Poole*. Plea—General issue.

The defence was, that after the bill had been dishonored, and notice of the dishonor given to the defendant; the plaintiffs had agreed to give time to the acceptor, and to take the amount by instalments, and that therefore the defend-

ant as drawer was discharged.

To substantiate this it was proved, that before the dishonor of the bill, the acceptor said he could not take it up; and that Mr. Ford, one of the plaintiffs, said he must pay as much as he could; and that several days after the dishonor of the bill, the acceptor, at the desire of Mr. Ford, paid 30l., which was written off the bill; and Mr. Ford, two or three days after, told the defendant that if a warrant of attorney was given, they would take it by instalments; however, no warrant of attorney was given.

ABBOTT, C. J. This is not giving time to the acceptor; giving time is where the party disables himself from suing on the bill; but giving the acceptor indulgence after notice of dishonor, and the holder getting all he can from the acceptor, is highly beneficial to the drawer. If the holder disables himself from suing on the bill, that discharges the drawer; but taking part of the amount from the acceptor, after the drawer has had notice of dishonor,

does not

Verdict for the plaintiffs.

F. Pollock, for the plaintiffs. Scarlett, for the defendant.

[Attornies-Gray, and Wrentmore & G.]

SECOND SITTINGS IN LONDON, IN MICHAELMAS TERM.

FOSTER et al., Assignees of FOWLER, a Bankrupt, v. FRAMPTON.

If goods be sold by A. to B., and sent by C., a carrier, and on their arrival at the town in which B. resides, he takes samples of them, and having no warehouse of his own, lets them remain in the warehouse of C. They cannot, after that, be stopped in transits.

TROVER for three hogsheads and twenty lumps of sugar. Plea-General issue.

It appeared that the bankrupt was a grocer at Birmingham, and that the defendant, who carried on business in London, sold the goods in question to the bankrupt, on the 30th of August, 1825, and that they were sent to Birmingham by a carrier named Corbet, accompanied by the following invoice:

London, 30th August, 1825.

Mr. Michael Fowler, 3 H.Hhds. raw sugar 20 Lumps				£148		
-			•	£180	3	

It was proved that on the 5th of September the goods arrived at Corbet's wharf, in Birmingham, and that the *bankrupt not having warehouses capable of containing hogsheads, his practice was to keep the more bulky part of his stock at Corbet's wharf. On the 6th of September the bankrupt took a sample from each of the hogsheads, and carried the lumps to his shop. The bankrupt committed an act of bankruptcy on the 4th of October, 1826, on which a commission of bankrupt was sued out. The hogsheads of sugar remained at Corbet's wharf till the 12th of October, when Corbet received notice from the defendant, as the vendor of the goods, to stop them, and not deliver them to the bankrupt; and the goods were afterwards delivered up to the defendant under an indemnity. It was further proved that the bankrupt had a quarterly account of carriage with Corbet, on which the credit was not expired at the time of the bankruptcy, and that he might have taken the sugars away at any time he had chosen to send for them

Gurney, for the defendant, contended, that as the goods had not been delivered, and were in the hands of the carrier, the transitus was still subsisting,

and the vendor might stop them.

ABBOTT, C. J. The warehouse of the carrier was, I think, the warehouse of the bankrupt, exclusive of the circumstance of the samples being taken, which is a fact much relied on in one of the cases. I am therefore of opinion that the transitus was at an end.

Verdict for the plaintiffs, damages, 1481. Searlett, and ———, for the plaintiffs. Gurney, for the defendant.

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[Attornies—Adlington & Co., and Few & Co.]

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*SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT

COBBETT, Executor of BOXALL, v. CLUTTON et al., Gents., two, &c.

If A. has in his possession a box containing papers belonging to a person deceased, and send the box with its contents to his solicitors, with directions to deliver the box and papers to the executor, on his giving an inventory of them, and a receipt: Held, that trever lies against the solicitors, if they refuse to deliver the box and papers to the executer, he refusing to give an inventory and receipt, although the solicitors offered to give them up if the executor would give an inventory and receipt.

TROVER for a box and deeds. Plea-General issue.

It appeared that the testatrix, Mrs. Boxall, died in the month of August, 1825, and that a box containing deeds and other papers belonging to the testatrix, was at the house of Mr. William Chutton, of Hartwood, a relation of the defendant Clutton. The box, with its contents, was sent by him to the office of the defendants to be delivered to the plaintiff as her executor, on the plaintiff's giving a schedule of the deeds contained in the box. It was proved that the plaintiff demanded the box and its contents of the defendants; but they refused to deliver it up, unless the plaintiff would give them a schedule of its contents.

Marryat, for the defendants. The defendants received this box from Mr. William Clutton, as his agents; and they had it delivered to them, on the special trust to deliver it to the plaintiff on his giving an inventory. Now, if they had delivered the box over against their authority, they would have been doing wrong. A demand and refusal are evidence of a conversion, but if is appears that the refusal was on a fair ground, that is no conversion. William Clutton was interested in the property, and without an inventory he could have no check on the executor, who might do what he chose with the papers in the box. And further, it is the daily practice when papers are delivered up, for the party delivering them to take a receipt specifying what papers are delivered up.

*ABBOTT, C. J. It is in evidence that Mr. William Clutton desired it; but I am of opinion that the defendants had no right to insist upon an inventory before they delivered up the box. The plaintiff, as executor, was entitled to the possession of the papers of the deceased, and that being so, he is entitled to recover in this action.

Verdict for the plaintiff.

Chitty, and Pattison, for the plaintiff.

Marryat, and Comyn, for the defendants.

[Attornies—Faithfull, and Clutton & Carter.]

BILLARD et al. v. HAYDEN et al.

If the importation of certain goods be probibited, and the plaintiff sell such goods in this country to A., who inderses a bill of exchange to him in payment—the plaintiff cannot recover on that bill against the acceptor, although there was no evidence that the plaintiff was the importer of the prohibited goods.

Assumers by the plaintiffs as indorsees, against the defendants as acceptors of a bill of exchange, drawn by a person named Fiestall, for 73l. 10s., payable

to the drawer's order, and by him indorsed to the plaintiffs.

The defence was, that the bill had been indorsed to the plaintiffs for the price of a quantity of French silks, sold by them to Fiestall, the drawer of the bill. This sale being antecedent to the stat. 6 Geo. 4, c. 111, which allows the importation of French silks, it was contended that it was void under the stat. 50 Geo. 3, c. 55, s. 1.†

*To prove this, the drawer stated that the plaintiffs were silk merchants, having a silk manufactory in Paris, and that he indorsed this bill to them in payment for a quantity of manufactured silk goods, which one of the plaintiffs stated to be French, though the witness could not possibly

swear that they were so.

Comyn, for the plaintiffs. The stat. 50 Geo. 8, c. 55, only prohibits the importation of foreign silks, and it does not at all appear that the silks were imported by the plaintiffs. The statute does not make the sale of them void; and I would submit, that as there is no evidence that the plaintiffs imported them, they are still entitled to recover on the bill.

Abbott, C. J. This transaction arose before the late *act. The stat. of the 50 Geo. 3, c. 55, prohibits the importation of all foreign silks, and I have no hesitation in saying that if these were foreign silks, and the bill was given in payment for them, the plaintiffs cannot recover.

Verdict for the defendants.

Comyn, for the plaintiffs. Chitty, for the defendants.

[Attornies-Griffen, and R. A. Cottle.]

† By the stat. 50 Geo. 3, c. 55, s. 1, it is enacted, "that no foreign silk, crapes, or tiffanies of any description whatever, (except of China or the East Indies, imported for exporfanies of any description whatever, (except of China or the East Indies, imported for exportation,) shall, from and after the passing of this act, be imported, brought, or conveyed into the kingdom of Great Britain, or the islands of Guernsey, Jersey, Alderney, Sark or Man; and if any such foreign silk, crapes, or tiffanies, shall be found in the custody or possession of any person or persons in Great Britain, or the islands aforesaid, and which shall not have been imported, brought, or conveyed into the same respectively, and on which the proper duty of customs shall not have been paid before the passing of this act, the same shall be forfeited; and in case any such foreign silk, crapes, or tiffanies, shall, at the time of the importation, be mixed with, sewed, or made up in any apparel, garment, or furniture, and other materials, in, with, or upon which the same shall be garment, or furniture, and other materials, in, with, or upon which the same shall be mixed, sewed, or made up, shall be forfeited, and the importer and importers, and the person and persons in whose custody or possession the said crapes, or tiffanies, or apparel, garment, or furniture, or other materials, shall be found; or who shall vend, utter, sell, or expose to sale, or otherwise dispose of any such crapes, or tiffanies, or apparel, garor expose to sale, or otherwise dispose of any such crapes, or tiffsnies, or apparal, garment, furniture, or other materials, or who shall sew, work, or make up any such crapes or tiffanies in *Great Britain*, or the islands aforesaid, for, or in, or upon any garment, or wearing apparel, shall be subject and liable to the like penalties, to which the importers and person having in their custody or possession, or vending, uttering, selling, or exposing to sale, or otherwise disposing, or sewing, working, or making up any foreign wrought silks or velvets, are subject and liable by an act passed in the sixth year of the reign of his present Majesty, for prohibiting the importation of foreign wrought silks and velvets."

But the prohibition contained in that section is repealed by the stat. 6 Geo. 4, c. 111, a duty is laid on the importation of foreign silks, which and by the stat. 6 Geo. 4. c. 111, a duty is laid on the importation of foreign silks, which was altered in some respects by the stat. 7 Geo. 4, c. 63.

Although this case is thus rendered less important as to foreign silks, it appears equally to apply to any other species of goods, the importation of which is prohibited.

MAYELSTON v. Lord Viscount PALMERSTON.

Variance. If in an action of covenant the declaration state that the deed was made between the plaintiff of the first part; J. C. of the second part; and A. B. of the third; and the deed, when produced, appear on the face of it to be by the plaintiff as trustee of J. C. of the first part; G. C. of the second; and A. B. of the third part; and the deed be executed by G. C. This is a fatal variance, although the breaches assigned do not in any way affect the party who is intended to be described as of the second part.

COVENANT. The declaration stated, that on the 26th day of November, 1803, "by a certain indenture then and there made between the said plaintiff, (therein described,) of the first part; James Cook and Hannah his wife, of the second part; and John Champain, (therein described,) of the third part; one part of which said indenture, sealed with the seal of the said John Champain, the said plaintiff now brings here into Court, the date whereof, &c., he the said plaintiff did demise and lease unto the said John Champain, &c., three several coach houses, &c., for twenty-one years. It then stated covenants by Champain and his assigns to keep the premises in repair, and to give up the premises and fixtures at the end of the term; that Champain assigned the term to the defendant; and breaches were assigned, that the defendant did not keep the premises in repair, &c. Plea, non est factum; and special pleas traversing all the breaches. The execution of the lease was proved.

Marryat, for the defendant, (having looked at the deed,) submitted that the plaintiff must be called. The lease is described in the declaration as an indenture of the plaintiff, of the first part; James Cook and Hannah his wife, of the second part; and John Champain, of the third part. Now, in point of fact, the deed itself states the plaintiff as the trustee of James Cook, and Hannah his wife, to be of the first part; and that George Cook and Hannah his wife are of the second part; and John Champain, of the third part; and the deed is executed by George Cook; so that he is called George in one part of the deed, James in another, and he executes as George. Now, I submit that in the declaration it should have been stated to be made by George Cook, because he executes it by that name; and if in the body of the deed he was called James, it should be stated to be made by George Cook, but purporting to be the deed of James.

Praced, on the same side. The allegation that the deed was made by certain parties, must be taken to mean, that it was executed by them; and in the case of Hall v. Cazehove, 4 Ea. 477, the correct form of declaring will be found. There the deed was sealed on a day different *from the date, and that was averred; and here the declaration should have first stated it as a deed purporting to have been made between such and such parties, and then

have averred that it was made by persons of different names.

Gurney, for the plaintiff. We have in our declaration followed the description of the parties at the beginning of the instrument, and we prove our allegation, by showing the parties to be so described in the deed.

† In the case of Hall v. Casehove, the declaration stated that, "whereas by a charter party of affreightment, purporting to be indented, made and concluded, in London, on the 6th of February, 1801, between the plaintiff as owner of the ship Argo, then lying in the river Thames, and bound for Demerara, on the one part; and the defendant and one J. B. of London, merchants, on the other part; but which charter party was in fact. first indented, made, and concluded after the 6th day of February, to wit, on the 15th of March. 1801, and not on the 6th of February, or at any time before, and was also in fact sealed and delivered by the plaintiff and defendant only, and not by the said J. B., one part of which charter party sealed, &c., the plaintiff now brings here into Court, the date whereof is the said 6th day of February, 1801, it was witnessed that the owner," &c. The defendant craved over of the charter party, and demurred, and showed for cause that it do not appear that the charter party was first indented, made, and concluded, after the 6th of February, 1801, but that it appeared by the charter party, that the same was indented, made, and concluded on the said 6th of February, in the year aforesaid, and that the plaintiff was by law estopped from making the allegations. But the Court overruled the demurrer, and gave judgmest for the plaintiff.

Talfourd, on the same side. The covenant we declare on is by Champain, and the part of the deed that regards him is all that is material to us in this cause.

ABBOTT, C. J. The question is, whether the plaintiff, in his declaration, has rightly described the deed: the declaration alleges it to be by the plaintiff, of the first part; James Cook and Hannah his wife, of the second; and Cham*477] pain, of the third. By one part of the deed that *appears to be correct, but by another part of the deed, it is made uncertain whether it is the deed of James Cook, or of George; and when we come to the execution, we find that that is by George Cook. Now, the plaintiff states it to have been made by James Cook, and I am of opinion that it was made by George Cook; and I think the plaintiff must be called.

Nonsuit.

Gurney, and Talfourd, for the plaintiff. Marryat, and Praced, for the defendant.

[Attornies-Ross & Co., and C. Wilson.]

† In the case of Gordon v. Austin and others, 4 T. R. 611, the plaintiff sued on a promissory note, made by the firm of Austin, Strobell, and Shirtliff, who were declared against by the names of William Austin, Robert Strobell, and William Shirtliff, the two last of whom were stated to be outlawed,—the defendant, Austin, pleaded the general issue. At the trial, it appeared that the note was signed by the name of the firm, as first mentioned; and it was proved that the partnership consisted of William Austin, Danier, Strobell, and William Shirtliff. It was objected that the plaintiff ought to be nonsuited, on the ground of variance between the contract declared upon, and that proved; it appearing to be between different persons. Erskine, contra, contended, that as the defendant was properly described, he could not take advantage of a variance with respect to the names of the others, and he having alone pleaded the general issue, the question at misi priss would only be whether he had promised or not. But the Court held, that the action, being on a written instrument, the evidence did not prove the contract declared on. And Mr. Justice Buller said—It stands thus, the plaintiff declared upon a note given by three persons, describing them, and the note given in evidence was made by different persons. The evidence, therefore, did not support the contract declared upon.

GREAVES v. HUNTER.

If a person prove that he has never seen the defendant write, and has never corresponded with him, but has seen papers in the master's office, which the attorney of the party admitted to be of his handwriting, and the person has acted on these papers so admitted: This is not such a knowledge of the party's handwriting as will enable the person to prove a written document alleged to be in his handwriting.

Money had and received. Plea-General issue.

To prove a letter to be of the defendant's handwriting, Mr. Holdsworth, the plaintiff's attorney, was called; he said, I know the defendant's handwriting from having seen other papers in the Master's office, which were admitted to be of his handwriting by the defendant's attorney, and I have frequently acted on those papers so admitted to be of his handwriting; but I never saw the defendant write, nor did I ever correspond with him.

ABBOTT, C. J. This is not sufficient. The witness cannot be allowed to compare the paper he is called to prove with those he speaks of at the Master's

office, which is all that this amounts to.

The plaintiff made out his case by other evidence.

Verdict for the plaintiff.

Brougham, and Talfourd, for the plaintiff. Scarlett, for the defendant.

[Attornies-Hutchinson & H., and Rosser.]

*COOKE, Esq., v. BANKS et al.

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On the question whether a place is parcel of a certain parish, old entries made by a charchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repsirs, &c., done to a chapel in the parish church, alleged to belong to the place in question, are not evidence.

TRESPASS for taking the plaintiff's goods. Plea—General issue. The defendants were parish officers of St. Andrew, Holborn; and the real question to be tried in this case was, whether the Stone Buildings in Lincoln's Ins.

were a part of the parish of St. Andrew, Holborn.

The taking of the goods was admitted; and among a great deal of other evidence to show that this part of Lincoln's Inn was a part of this parish, and that the inhabitants of Lincoln's Inn had a chapel in St. Andrew's Church—the defendant's counsel, having proved that a person named Benlley was churchwarden of the parish in the year 1584, wished to read several entries in a book, produced from among the parish books, written in a handwriting of Queen Elizabeth's reign, the title of which was, "The Sacristary Register or Vestry book, containing the days, and years, and names of such temporal officers belonging to the church and parish, as yearly are to be chosen, by order, within the parish of St. Andrew, in Holborn, at the vestry; and also all such rates, ordinances, decrees, statutes, arbitraments, and agreements, as have been had, made, and done, by the parson, churchwardens, and assistants, from time to time, since the year of our Lord, 1581, at their several sittings, to the glory of God, the peace of the church, and wealth of the parish, now first collected and reduced into a register or book for good order sake, and a precedent to be followed and well continued and kept of his successors, by Thomas Bentley, churchwarden, A. D. 1584."

Near the end of the book was this title, "Some monuments of antiquities worthy memory, collected and gathered out of sundry old accounts, had and made by churchwardens, night wardens, and such like officers of the parish, since the time of king *Henry the sixth*, by *Thomas Bentley*, Gent., some time an unprofitable member and churchwarden of the parish, in the year of our

Lord, 1584."

*Under this title was the following entry, which the defendants' counsel proposed to read;—

"Item, the first three pews in Lincoln's Inn Chapel, were made by Balian, carpenter, at the assignment of Lincoln's Inn Chapel.

Mr. Heryn, then churchwarden, and cost the parish 5l., which eight pews cost in all 10l. 16s. and better, as

which eight pews cost in all 10*l*. 16s. and better, a appears in Mr. Roper's accounts.

Appears in Mi. Nopel's accounts.

ABBOTT, C. J. (Having read the entry.) This is matter of history, and therefore is not evidence.

Scarlett, for the defendants. I submit it to your I and him as matter of representations.

Scarlett, for the defendants. I submit it to your Lordship as matter of reputation, and therefore evidence.

ABBOTT, C. J. General reputation may perhaps be evidence, but not a statement of particular facts.

Scarlett. I wish to show a reputation that Lincoln's Inn had a chapel in St. Andrew's, Holborn.

ABBOTT, C. J. I think that this entry is not admissible as evidence of that fact.

Scarlett then proposed to read the entry which was in the same book next but one to the preceding. It was as follows:

All the glass windows in the church pitionaly broken with the burnt in Shoe Lane. Mr. Steward's arms set up in Lincoln's Inn chael window, A. D. 1580, are defaced and broken.

"Mem' That this year also, in the month of July, 1583, all the glass windows in the church, 25 Eliz. especially the windows in Lincoln's Inn chapel, a little before new glazed with many fair coats or scutcheons clap of gunpowder of arms, emblazoned at the only charges of Mr. -Steward, that married Mrs. Compion, of this parish, and late deceased, were pitifully shaken, rent, and broken down, as *480] all the houses round about that part of the *parish alsmost were, with the monstrous and ruge blast of the gunpowder, that lately was set on fire and blew up all the gunpowder house, and other tenements in Fetter Lane, to the

destruction of many houses and spoil of much goods thereabouts, yea, and to the death of one or two men."

Scarlett. We submit, that this entry is evidence, because, at this time, Bentley was churchwarden; and as this entry goes to admit that the parish were bound to repair the windows, it is an admission of a right against themselves.

Abbott, C. J. Does the writer of the book charge himself by this entry?

Scarlett. No, my Lord.

Tindal, S. G. The title in the book under which these entries are placed, is, "Some monuments of antiquities worthy of memory, collected by Thomas Bentley, churchwarden, in the year 1584," and the running title of that part of the book is, "Memorable Antiquities."

ABBOTT, C. J. (Having read the entry.) It is the history of blowing up a house in Fetter Lane, by gunpowder, and the effect it had on the parish church.

Scarlett. We don't use it as evidence of the fact of the blowing up of the house, but as the reputation of the limits of the parish; and we submit that this entry would be evidence if the question were whether the churchwardens

were bound to keep this window in repair.

ABBOTT, C. J. The entry speaks of the glazing being done by a particular

individual. I think it is not evidence.

The defendants' counsel then offered an entry, in the *same book, next after the entry above set forth. It was as follows:

"Memen. That the new door of stone and The new stone wainscot in Lincoln's Inn chapel, leading to the 26 Eliz. door in Lincoln's Inn Chapel, made. south church yard, was made this year by consent of the vestry, for the ease of the parishioners, gentlemen, and others, lately placed in the new pews, the chancel and aisles; which alone, all charges received, stood the parish in 4l. 3s. 11d. as appeareth more partlarly in the book of accounts."

"Mem" That the two pews wherein Mrs. The four new pews Payne and Mrs. Bartlett now are set, together 26 Eliz. in Lincoln's Inn with the two wainscot pews, where Mrs. Aylworth Chapel first made. and Mrs. Cowper are placed, were this year also new added w Mr. Peryn's pews. made in his first time, and now first made for Mrs. Aylworth, at the charges of the parish for the most part, save that Mr. Aylworn gave towards his wife's pew fifty shillings. The charges of these four pew as appeareth by the accounts, was above 71., whereoff Mr. Aylworth, as I saw paid fifty shillings for his wife's pew; so they stood the parish but in 41. 16s.

ABBOTT, C. J. These entries profess to speak only of particular facts: an entries of particular facts are not receivable, unless the party making them

charges himself; that is the general rule.

Scarlett. That, my Lord, is undoubtedly the general rule. But I submit, that this is in the nature of a public book; and if the question was, whether a particular part of the parish had a right to a certain pew in the church, would not an entry, stating that the parish had repaired it, be evidence against the parish?

*Absort, C. J. This entry does not go near that. If you feel confident that it ought to be received, I will receive it, but my present

opinion is, that it is inadmissible.

The defendants' counsel then withdrew the book.

Verdict for the defendants.

Tindal, S. G., Nolan, and Campbell, for the plaintiff. Scarlett, Gurney, Merewether, and Coleridge, for the defendants.

[Attornies-Green, P. & C., and J. S. Taylor.]

Tindal, S. G., obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence.

† Entries in private books are in general not evidence, unless the party making them charge himself by so doing; but entries in the books of deceased rectors, vicars, &c., are evidence as to questions of tithe, because these entries can only benefit their successors. In the case of Bullen v. Michel, 4 Dow. 297, and 2 Price, 399, where the question was, whether certain farms were covered by moduses, the defendant, having shown that search had been made in the registries of the diocese for the endowment of the vicarage, wished to read as secondary evidence of it, certain entries from a book called the Chartslery of Glastonbury Abbey, to which abbey the advowson had belonged. This Chartulary was produced from the muniment room of the Marquis of Bath, into whose hands some of the lands of the Abbey had passed. This book contained, besides the entries in question, several others relative to the rights of the Abbey, an account of the giants who originally inhabited the British Island, a genealogy of the Kings of England, beginning with Adex, something de pondere Lance, a calendar, a list of bulls and licenses, &c.. The handwriting was proved, from its style, to be of the end of the 13th, or the beginning of the 14th century. These entries were objected to, and Chambre, J., held them to be inadmissible; but the Court of Exchequer (Wood discentiente) granted a new trial, conceiving that they ought to have been admitted: Bayley, J., at the second trial admitted them; and a vertice being found for the defendant, the plaintiff afterwards appealed to the House of Lords: and it was there held that the entries were rightly admitted in evidence.

*WEMYS, Esq., Executor of WEMYS, v. GREENWOOD et al. ['483

Practice—Where a case turned solely on a question of law, and there was no fact in dispute between the parties, the L. C. J. refused to certify for the special Jury.

Money had and received. Plea—General issue.

This action was brought by the plaintiff, as executor of the late General

Wemys, to recover a sum of 2001., alleged to have been due to him, as a balance of the off reckonings of the ninety-third regiment of foot, of which the plaintiff's testator had been colonel. There was no fact in dispute, and the case turned on a mere question of law. The Jury found a verdict for the plaintiff, subject to the opinion of the Court of King's Bench, on a special case.

Brougham, for the plaintiff, applied to the Lord Chief Justice to certify that

this was a fit case to be tried by a special Jury.

ABBOTT, C. J. I cannot certify for the special Jury; here is no question of fact in dispute between the parties, and I cannot say that there was any necessity for a special Jury.

Brougham, and Parke, for the plaintiff.

Tindal, S. G., and Curwood, for the defendants.

[Attornies—Vizard & B., and Fynmore & Co.]

REX v. CROSS.

It a party set up a noxious trade, remote from habitations and public roads, and after that new houses are built, and new roads constructed near it, the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads.

INDICTMENT for a nuisance in keeping a house for slaughtering horses, at a place called *Bell Isle*, in the parish of *St. Mary, Islington*. There were also counts *framed on a private act of Parliament, 59 *Geo.* 3, c. 39, s. 88, on which no question was raised. Plea—Not Guilty.

It was also proved that very offensive smells proceeded from the defendant's slaughtering house, to the annoyance of those who lived near it, and also of persons who passed along a turnpike road, leading from Battle Bridge to Hollmann.

The defendant put in a certificate and license, under the statute 26 Geo. 3, c 71, s. 1, authorising him to keep a house for the slaughtering of horses.

ABBOTT, C. J. This certificate is no defence; and even if it were a license from all the magistrates in the county to the defendant to slaughter horses in this very place, it would not entitle the defendant to continue the business there, one hour after it becomes a public nuisance to the neighborhood. If a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other.

Verdict-Guilty.

Scarlett, Gurney, and Adolphus, for the prosecution. The defendant in person.

[Attornies—Tims of Scadding, and Coleman.]

*REX v. NEIL.

To support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they be offensive to the senses.

INDICTMENT for a nuisance, in carrying on the trade of a varnish maker, at Bell Isle, in the parish of St. Mary, Islington. This indictment also contained counts framed on the private act of Parliament, 59 Geo. 3, c. 39, s. 88, on which no question was raised.

For the prosecution, it was proved that offensive smells proceeded from the defendant's manufactory, to the annoyance of persons passing along a road lead-

ing from Battle Bridge to Highgate.

The defence put in proof was, that the smells that proceeded from the defendant's manufactory, were not injurious to health; and, secondly, that at Bell Isle, and in the immediate neighborhood of the defendant's manufactory, there were several houses for slaughtering horses, a brewery, a gas manufactory, a melter of kitchen stuff, and a blood boiler; and that although the accumulation of all the smells was offensive, yet that the defendant's alone would not have been so, and therefore was no nuisance.

ABBOTT, C. J. It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, knackers, melters of kitchen stuff, &c.; but the presence of other nuisances will not justify any one of them; or the more nuisances there were, the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question therefore is this—Is the business as carried on by the defendant productive of smells offensive to persons passing along the public highway?

Verdict—Guilty.

Scarlett, Gurney, and Adolphus, for the prosecution. Denman, C. S., and Chitty, for the defendant.

[Attornies-Tims & Scadding, and Martin.]

In the case of Rex v. White and Ward, 1 Bur. 337, Lord Mansfield lays down, that, to constitute a nuisance, "it is not necessary that the smell should be unwholesome, it is enough if it renders the enjoyment of life and property uncomfortable."

*REX v. WATTS. ·

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If by a private act of Parliament, all houses for the slaughtering of horses within one thousand yards of a certain workhouse, are to be deemed public nuisances and removed; but if they existed before the act, the owners are to receive a compensation:—Held, that if an indictment be framed at common law with counts on that act, the defendant may be convicted if he so carried on the trade as to make it a public nuisance, and that he is not then entitled to any compensation.

INDICTMENT for a nuisance in using a certain house for slaughtering of horses. The first five counts were framed on a private act of Parliament, 59 Geo. 3, c. 39, s. 88, for keeping a slaughter house for the killing of horses, within one thousand yards of St. Pancras Workhouse; the sixth and seventh counts were for a nuisance at common law. Plea—Not Guilty.

It was proved that the defendant kept a slaughter house for the killing of

horses, within eight hundred and forty-four yards of St. Pancras Workhouse, and it was also proved that smells proceeded from it, which were a great nui-

sance to persons passing along the adjoining highway.

Holt, for the defendant. I submit that the defendant ought not to be convicted, because by the private act of Parliament, 45 Geo. 3, c. 99, s. 56,† it is enacted, that if any person should keep a slaughter house *for the slaughtering of horses, within one thousand yards of the workhouse, such house should be deemed a nuisance, and be removed according to law: but that section further enacts, that if any person had kept any such place for such purposes, before the passing of that act, and should be aggrieved by the removal of it, he should be entitled to a compensation, to be estimated in the manner there pointed out. Now, the defendant carried on the business before the passing of that act. It is true that the 88th section of the private act, 59 Geo. 3, c. 39,‡ does not speak of any compensation; but it will be seen that that section applies only to persons who "shall keep or use any house or place for the slaughtering or killing any horse, &c.," which clearly relates *to persons who shall begin to keep such houses after the passing of this latter statute. The former statute, 45 Geo. 3, is indeed now repealed by the stat. 59 Geo. 3; but I submit that that earlier statute would still apply to all cases which occurred before the passing of the stat. 59 Geo. 3, which repealed it.

ABBOTT, C. J. If the defendant's slaughtering house was so conducted as

[†] By the private act of Parliament, 45 Geo. 3, c. 99, s. 56, after reciting that "whereas it is of great consequence not only to the preserving of the health of the poor, who may be assembled in the said workhouse [of the parish of St. Pancras,] but to the preventing of the spreading of contagious disorders, that no infectious, or noxious, or unwholesome trade or business should be carried on near to said workhouse; it is enacted 'that if any person or persons shall keep or employ any house or place for the purpose of slaughtering or killing any herse, mare, or gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, or other cattle, which shall not be killed for butchers' meat, or of boiling or preparing varnish, or oil, or of carrying on any other infectious, noxious, or unwholesome business, within the distance of one thousand yards from the workhouse, to be erected by virtue of this act, every such house, or place, kept for such purpose, shall be deemed and taken to be a common and public nuisances, and shall and may be removed, taken down or abated, according to law, with respect to nuisances; and in case any person or persons, who before the passing of this act shall have erected, kept, used, and employed any house or place for any of the purposes aforesaid, shall think himself, herself, or themselves aggreed by the removing or taking down of such house, or the abatemont of such nuisance as aforesaid, it shall and may be lawful to and for the said directors, and they are hereby required, on application to be made to them at one of their meetings, by the party or parties considering himself, herself, or themselves aggrieved as aforesaid, to make such compensation to such party or parties for the damage by him, her, or them sustained as above mentioned, as to the said directors shall seem reasonable; and in case such party or parties, and the said directors, cannot agree as the amount of any such compensation, then and in every such case, such compensation shall be ascertained and settled b

The private act of Parliament, 59 Geo. 3, c. 39, s. 88, which repeals the former statute, after reciting, that "whereas it is of great consequence not only to the preserving of the health of the poor who may be assembled in the said workhouse, but to the preventing of the spreading of contagious disorders, that no infectious, noxious, or unwholesome trade or business should be carried on near to the said workhouse, enacts 'that if any person or persons shall keep, use or employ any house or place for the purpose of slaughtering or exiling any horse, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, or other cattle, which shall not be killed for butchers' meat, or of boiling or preparing varnish, or oil, or of carrying on any other infectious, noxious, or unwholesome business, within the distance of one thousand yards from the workhouse, every such house and place, kept for such purpose, shall be deemed and taken to be a common and public nuisance, and shall and may be removed, taken down, or abated, and the person or persons who shall keep, use, or employ the same may be proceeded against by indictment or otherwise, according to law, with respect to nuisances."

to be a public nuisance at common law, the parish might at any time have caused it to be removed, and I am clearly of opinion that in this case it was so conducted as to be a nuisance at common law, and that the defendant would not have been, and is not, entitled to any compensation.

Verdict—Guilty.

Scarlett, Gurney, and Adolphus, for the prosecution. Holt, and Parke, for the defendant.

[Attornies-Time & Scadding, and Smith & Buckerfield.]

TOD et al. v. The Earl of WINCHELSEA et al.

To constitute a good attestation of a will of lands, it is not necessary that the testator should actually see the witnesses sign the attestations; it is sufficient if he were in such a situation that he might see them attest his will.

If on the evidence it appear that the testator was too weak to get out of bed, and it be doubtful whether the attestation was signed in the same room in which he was, or in the next room, the door being open; it will be for the Jury to say, whether the will was attested either in the same room, or in such a part of the next room that the testator might see them sign the attestation: in either of those cases the attestation is good. But if the Jury should think that the attestation was signed by the witnesses at a part of the next room where the testator could not see them, that is not a good attestation, notwithstanding the door between the two rooms was open, and the testator might hear what the witnesses said in the next room, if they spoke in the ordinary tone of voice.

Issue directed by Lord Gifford, late Master of the Rolls, to try whether the late Duke of Roxburgh devised his real estates or not.

The real question was, whether his will was duly attested under the statute of frauds.

It appeared that his Grace was ill at his house in St. James's Square, and that Mr. Dundas, an eminent writer to the signet at Edinburgh, drew his will. Sir Coutts Trotter, who was one of the subscribing witnesses, stated that on the 19th of March, 1804, which was the night before his Grace's death, he was at his Grace's house in St. James's Square, to attest the will in question. The Duke was in bed, and the door was open between his Grace's The Duke signed the [*489 *bed-room and a room called the writing-room. will in bed, being supported with pillows; he was exhausted by signing his name to the first sheet, but his position being changed, he signed the others. After his Grace had signed the whole of the sheets of the will, Sir Coutts Trotter stated, that as far as he recollected, he took leave of the Duke, and himself, with the other witnesses and Mr. Dundas, then went into the writingroom, the door between the two rooms remaining open, and that the witnesses signed their names to the attestation, on a table in the writing-room, but what sort of a table it was, or where it stood, he could not remember. Sir Coults Trotter also could not say whether the Duke could see them when they signed the attestation; nor did he then know that it was material that his Grace should do so; but the witness thought that a person in one of the rooms could hear what passed in the other, if the persons there spoke in the ordinary tone of conversation.

Mr. Baptiste, another of the subscribing witnesses, whose deposition taken on interrogatories was read, he being too ill to attend, stated, that he believed the will was attested in the room where his Grace was, but that he was not positive. It however appeared that when that witness made deposition as to

the whole of the time.

the Scotch estates of the Duke of Roxburgh, he then thought the will was attested in the adjoining room. The other subscribing witness was dead.

It was proved, that as his Grace lay in bed, he could only see one end of the writing-room; and that there were three tables in it, one in the middle of the room, which as he lay in bed he could not see, another which stood in a pier between two windows, which he could see as he lay in bed, and a third, which was a moveable table running on castors, which he could see as he lay in bed, if it was wheeled near the door, or to that end of the room where the pier table stood.

Tindal, S. G., for the defendants. Upon this evidence *it must be taken that the will was attested in the room adjacent to that in which his Grace lay in bed; and it must be proved to the satisfaction of the Jury, that the will was, in point of fact, attested by the witnesses in such a situation that the testator could see them sign their names. Now here, at the most, it is quite doubtful, because, if it was attested on the table in the middle of the room, as it most likely was, it was quite impossible for his Grace to see them; and if the Jury cannot say, on their oaths, that the will was attested where he could see the witnesses attest it, it is no more a valid will than if it had been

attested by two witnesses instead of three. Scarlett, in reply.—I submit that the witnesses might have attested the will on the pier table, or the moveable table, or that the testator might have got out of bed and come to the door of the writing-room, so as to have seen every part of that room. But I don't put it upon that. I contend, that although the attestation must be in the testator's presence, yet, that the word "presence," when you depart from the literal meaning, must be taken to mean this, that the will shall be attested before there is the opportunity of fraud, or unfair dealing, and that ocular presence not being necessary, if it is an unbroken action, and substantially in the same place, that is enough. If that is not so, to what extent are we to go? If all the parties had remained in the same room, and there had been a screen over which the testator could have looked, or if the bed curtains had been drawn, those would, either of them, have been sufficient. Now I submit that the witnesses, in this case, were virtually in the presence of the testator, during the whole time; he used both these rooms as a sick man, and none left the place till the whole was concluded. If the bed curtains were drawn, and the witnesses had remained in the room, that would have been good; why? because the testator might have drawn back the curtain: so here the testator might have got out of bed while they *were signing the attestation, and so have seen them at any part of the writing-room. Eye-sight is just as much excluded by a curtain as a wall, and the testator getting out of bed and looking through the door, is just as possible as drawing back the curtain. If the testator might see the attestation, that is enough, no matter whether he did or not; and it should not be forgotten that Sir Coutts Trotter proves that they were within hearing during

Abborr, C. J., (in summing up to the Jury)—The question is, whether this will was attested in the presence of the Duke of Roxburgh. By the statute of King Charles the Second, it is required that the witnesses, who attest a will of lands, shall do so in the presence of the testator, and you have to consider whether they did so in this case. As to what shall be held to be "in the presence" of the party; it cannot be necessary that it should be in his sight, as the testator might have lost his sight, and in such cases other circumstances have been held to be sufficient. The rule to be drawn from all the decisions, which I mean to leave to you as the law, is this: was or was not the will attested by the witness in such a place that the Duke of Roxburgh might have seen what they were doing? I don't say that it is necessary that you should be satisfied that he did see them. If it were attested in the room in which he was, it is clear upon the cases that that is sufficient; if a table was brought to

the door, he might then have seen; but if it was done on the table in the middle of the room, he could not. As to the supposition that he got out of bed, I think that there is no foundation for that, because he was assisted to rise in his bed, and was exhausted by the writing of his name the first time. One witness says, the will was attested in the room, but Sir Coutts Trotter thinks otherwise; and the former, on another examination, said, that he thought the will was attested in the next room. But it does not follow that the Duke could not see the attestation, because it was *attested in the adjoining room. If it was executed at the pier table he might have seen it, or if the moveable table was placed in one part of the room, he might also have seen it. You will therefore have to say, whether the will was attested in the bed-room; if so, there is no doubt; but if you think it was attested in the other room, whether it was attested in such a part of that room that the testator might have seen the witnesses attest it: in either of those cases, the plaintiffs are entitled to a verdict. But if you think otherwise, I am of opinion that in point of law you ought to find a verdict for the defendants.

Verdict for the plaintiffs.

Scarlett, Gurney, Jacob, and Jardine, for the plaintiffs.

Tindal, S. G., Denman, C. S., Brougham, S. M. Phillips, and Stewart, for the defendants.

[Attornies—Foss & Co., and Rogers & C.]

The authorities on this subject will be found collected in Powell on Devises, (Jarm Edit.) from p. 80 to p. 112.

HICKENBOTHAM v. GROVES et al.

If A. let a house to B., with a covenant that the lease shall determine on B. committing any act of bankruptcy on which a commission of bankrupt should issue; and by another deed of the same date, A. grants the use of the furniture to B. in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy: if B. become bankrupt, and the Jury find that B. was the reputed owner of the furniture, it will pass to the assignees notwithstanding these covenants; and if it be proved, on the one side, that several of the servants of B., and many of his customers knew that the goods belonged to A.; and on the other side, several of B.'s creditors prove that they considered the goods to belong to B., and gave him credit upon the faith of them; and that he acted as master of the house, &c., it will be for the Jury to say, whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them.

TRESPASS for breaking and entering the plaintiff's house, and taking away

his goods. Plea-General issue.

It appeared that the plaintiff had been for some years the owner and occupier of the Petersburgh Hotel, in Dover Street, Piccadilly; and that on the 29th of September, 1820, the plaintiff granted a lease of the hotel to a *person named Hodgson, for a term of fourteen years and three quarters, wanting ten days, at a rent of 400l. a year; and there was a covenant that the lease should be void in case that Hodgson should commit any act of bankruptcy, on which any commission of bankruptcy should issue. By another deed of the same date, the plaintiff granted to Hodgson the use of the furniture, &c., contained in the hotel, at a further sum of 600l. a year; and this deed also contained a covenant that Hodgson should be at liberty to purchase the goods, and

also a covenant that his interest in the goods should be at an end, and be determined on his committing any act of bankruptcy, on which any commission of bankrupt should issue against him, and that the plaintiff should again resume the possession of the goods. In the month of March, 1823, Hodgson having become insolvent, a commission of bankrupt was sued out against him, on the petition of Joseph Gibson, and on this commission Hodgson was declared a bankrupt. Two of the defendants were appointed assignees under it, the other defendants were the solicitor, messenger, and others, persons acting under their authority. In the month of April, 1823, the plaintiff brought an ejectment to recover possession of the hotel, in consequence of the forfeiture of the lease by reason of the bankruptcy of Hodgson. In this ejectment judgment for the plaintiff was entered up, and possession delivered to the present plaintiff, under a writ of possession, on the 13th of June, 1823. The plaintiff being thus in possession, the defendants, on the 16th of June, 1823, came to the hotel, and having broken in a panel of the door, took away the whole of the furniture of the hotel, which was the same that had belonged to the plaintiff, and had been used by *Hodgson*, under the deed of the 29th of September, 1820. They took the furniture, alleging that it had belonged to Hodgson, and that it had passed to his assignees. Some time after this the commission of bankrupt against Hodgson was superseded.

On these facts the plaintiff claimed a compensation for the injury done to his house, and to the furniture in the removal of it; and also for the loss occasioned to him by being deprived of the use of it for ten months, at the expiration of which period he had obtained the possession of it. In anticipation of the defence, it was proved by one of the waiters at the hotel, that he knew that the goods were the property of the plaintiff, and not of *Hodgson*; and that some of the other servants, and many of the customers of the house

knew that also, but that other customers did not.

The defence as to the goods was this, that after the commission of bankrupt against Hodgson was superseded, another commission of bankrupt was sued out against him on the petition of the plaintiff, on which he was declared a bankrupt, and the plaintiff and another appointed assignees. And it was contended that Hodgson was the reputed owner of the goods, and that therefore the plaintiff could not recover for the taking of them; because, under the second commission, they had passed to the plaintiff and another as assignees of Hodgson: and it was further contended, that the covenant in the second deed of the 20th of September, could make no difference, if Hodgson was the reputed owner of these goods. To show that he was the reputed owner of the goods, it was proved that when he took the possession of the hotel, the name of it was changed from the Petersburgh Hotel to Hodgson's Hotel; and that the business was carried on for two years in his name; and four of the tradesmen with whom Hodgson dealt while he kept the hotel, proved that they considered him as the owner of the goods, and that they gave him credit on the faith of the property they saw in the house; and as a further proof that the plaintiff himself treated the goods as the property of the assignees of Hodgson under the second commission, it was proved, that he went with the messenger under that commission, and obtained possession of the goods from two of the defendants under the warrant of the commissioners acting under that commission.

*Scarlett, in reply. I submit that Hodgson was not to be considered as the reputed owner of these goods. If the goods had originally been Hodgson's, and he had executed a bill of sale of them, and still been allowed to have the disposition of them, then the case might have been otherwise; but here he had only a particular interest in them, and had no right to sell or dispose of them; and where the party has but the limited right of using the goods, and not the right of selling, pawning or disposing of them, he cannot be considered as the reputed owner of them. In the case of Muller v. Moss, 1 M. & S. 335, it was held, that where a person bought a house and goods, and per-

mitted the vendor to remain in possession for three months, the vendor was in possession of a distinct interest, and was not to be considered as the reputed owner of the goods; and further, I apprehend that when the plaintiff entered under the writ of possession, on the 13th of *June*, an end had been put to the deeds, and that the plaintiff was in possession as owner of the house and of all in it.

ABBOTT, C. J., (in summing up to the Jury.) As to the breaking of the house, the plaintiff is entitled to a verdict; but the most important question in this case is, whether the goods are to be considered, in law, as the property of the plaintiff. The counsel for the defendants say, that this was a case of reputed ownership, and the question therefore is, whether these goods were suffered to be in the possession of Hodgson, in such a manner that he was the reputed owner of them. If you think that he was held out to the world as the reputed owner, and that he obtained credit from the possession of them, I am of opinion that, in point of law, they would pass to his assignees. It appears that Mr. Hickenbotham had kept this hotel, and that he granted a lease to Hodgson, in which there was a covenant that if Hodgson committed any act of bankruptcy, on which a commission of *bankrupt should issue, that the plaintiff should resume his possession. By another deed, Mr. Hickenbotham demised the furniture to Hodgson, who was to be at liberty to purchase it on certain terms set forth in the deed; and this deed also contains a clause that the plaintiff shall resume the possession of the furniture, if Hodgson should commit any act of bankruptcy, on which a commission should issue. But those were private contracts between these parties, and being unknown to the world, they will not help the plaintiff, if you think that these goods were in the order and disposition of the bankrupt. For two years the bankrupt lives in the house as the owner of it, his name is put up as the master of it, and he acts as such. It is true, that he told one of his servants that he had it as a ready furnished house, and also that many customers knew that, but many did not. But although the customers of the house might be aware of the fact, it does not follow that the world at large knew it; and those persons who did know it were all debtors of the house, and not creditors; and three or four of Hodgson's creditors prove that they gave credit to him as the owner of the property. The case cited was that of a house, which was a private dwelling; and what is most important, it was found as a fact, that the real ownership of the property was public and notorious. If that was known, nobody could be deceived, which is most material. When the first commission was superseded, there seems to have been nothing to prevent the plaintiff from claiming the goods, unless he felt that there was a difficulty about the reputed ownership; but instead of doing that, the plaintiff himself takes out a second commission against *Hodgson*, and under a warrant granted by the commissioners under that commission, he gets possession of the goods. is a strong fact. Why should he have recourse to process under a second commission, if he were not conscious that he had put himself in such a situation as to let *Hodgson* appear as owner of the goods? This, however, is not conclusive, but is a strong fact for your consideration. But if you *think the reputed ownership made out, the plaintiff is still entitled to damages for the breaking of the house.

Verdict for the plaintiff, damages 40s., for the breaking of the house; and the Jury found that *Hodgson* was the reputed owner of the

Scarlett, F. Pollock, Brougham, and Law, for the plaintiff.
Gurney, Denman, C. J., Curwood, Campbell, E. Lawes, and Alexander for the respective defendants.

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In the case of Muller, Assignee of Meck, v. Mess, 1 M. & S. 335, there was an agreement between the bankrupt and the defendant, by which the bankrupt agreed, on payment of a certain sum, to convey to the defendant a dwelling house, and to deliver possession of all the household furniture and stock; and that after formal possession should be delivered to the defendant, the bankrupt should be allowed to remain in possession for three months without paying rent. This agreement was notorious in the neighborhood, and on the exchange at Liverpool, on the day after it took place. The money was paid by the defendant, and a formal delivery made to him, and the bankrupt left nossession according to the agreement. The bankruptcy occurred during the three months; and it was held, that this was not a reputed ownership in the bankrupt.

BEFORE MR. JUSTICE LITTLEDALE,

(Who sat for the Lord Chief Justice.)

FARQUHAR et al. v. SOUTHEY et al.

An acceptor of a bill is not discharged by the bill not being presented for payment for three or four years after it becomes due. He is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him.

Assumers by the plaintiffs as indorsees of two bills of exchange, drawn by a person named *Leader*, and accepted by the defendants. The bills were each for 500*l*., one of them was dated *June* 3d, 1822, and payable three at four months after date; the other was dated *June* 16th, 1823, and payable at four months after date.

It appeared that Leader, the drawer of the bills, and the defendants had both kept accounts at the house of Messrs. Marsh & Co. as their bankers, up to the time when that house stopped payment, in the year 1824, when the defendants and Leader each opened an account with the plaintiffs. Leader generally owed the plaintiffs money, as they discounted bills for him, but sometimes his cash balance was as large as 1000l.; Leader paid these bills to the plaintiffs, who placed the amount to his credit, and charged him interest; but they did not call on the defendants, as acceptors, to pay them, till the month of May, 1826.

The defence was, that these were accommodation bills, and that the plaintiffs had discharged the acceptor by taking interest from the drawer, and by letting so long a time elapse before they called on the defendants; and the case of Ellis v. Galindot was relied on.

The witness who was called to prove that they were accommodation bills, stated that there were dealings in trade between *Leader* and the defendants; and that sometimes they drew on him, and he accepted for their convenience, and sometimes they did so for his.

† Doug. 250 a. In this case the question was, whether something indorsed on the back of the bill ought not to have been left to the Jury, for them to say whether there had been an agreement to discharge the acceptor. In Anderson v. Cleveland, 13 East, 430 n., Lord Mansfeld said, the acceptor of a bill, or maker of a note, always remains liable; the acceptance is proof of his having assets in his hands, and he ought never to part with them, unless he be sure that the bill is paid by the drawer. And in the case of Adams v. Gregg, 2 Stark. 533, Abbott, C. J., intimated, that he thought a declaration made by A., (who had taken up the bill for the drawer,) that the acceptor should not be troubled, was not sufficient, in point of law, to discharge him.

F. Pollock, in reply, contended, on the authority of the *cases of Dingwall v. Dunster, and Atwood v. Crowdie, that neither lapse of time, nor receiving interest from the drawer, would discharge an acceptor; and that nothing short of an express agreement that the defendant should be discharged from liability on the bills, would avail the defendants as a defence to

the present action. LITTLEDALE, J. I think that these must be taken to be accommodation bills; but that there was cross paper passing between the defendants and Leader. These bills, it appears, get into the hands of the plaintiffs, who are bankers, and are discounted by them for Leader. Now these bills, though given for his accommodation, are binding on the acceptors; and unless there be some-thing to discharge the acceptor, he is liable. The liability of an acceptor is different from that of a drawer or indorser. The acceptor is liable at all events, and is not discharged unless the bill be paid, or there be an express agreement to discharge him, or a distinct renunciation of his liability. The defendants *put the case on two grounds: First, that the plaintiffs took interest on the bills from Leader. This is used to show that they had discharged the acceptor; and, secondly, that there was no claim on the defendants till May last; and from this you (the Jury) are asked to infer that there was an agreement to discharge the defendants. I think that the charging interest by a man's own banker, who had advanced money on securities sent to him to be discounted, proves little as between indorsee and acceptor on the question whether the indorsee meant to discharge the acceptor; and as to the second point, that the plaintiffs did not present the bills to the defendants till May last, it is not at all required that they should do so: however, from this you are asked to infer an agreement by the plaintiffs to discharge the defendants. But why should they discharge the defendants? They had no sort of inducement to do so; and unless you (the Jury) think that there was a direct agreement by the plaintiffs to discharge the defendants, the plaintiffs are entitled to recover.

Verdict for the plaintiffs—Damages, 1000%. F. Pollock, and Henderson, for the plaintiffs.

Scarlett, and Parke, for the defendants.

[Attornies-Macdougall & Co., and Rosser & J.]

† Doug. 235 a. In this case it was held that no laches of the holder, and no forbearance

to call on the acceptor for the amount of the bill, will discharge him.

† 1 Stark. N. P. C. 483. In this case the bills were drawn by Kent & Co., and accepted ‡ 1 Stark. N. P. C. 483. In this case the bills were drawn by Kent & Co., and accepted by the defendants, payable to Mattingley & Co., and by them indorsed to the plaintiffs. Mattingley & Co., who were country bankers, owed money to the plaintiffs, who were London bankers, and, being pressed by the plaintiffs, sent up the bills in question for account. These bills were accepted for the accommodation of Mattingley & Co.; and before the time when they became due, the cash balance at the plaintiffs' turned in favor of Mattingley & Co., but the bills were not withdrawn; and the balance subsequently turned much against Mattingley & Co., and they failed. Scarlett, for the defendants, contended, that these bills were only sent to cover an existing balance which had been satisfied just before these bills became due. But Lord Ellenborough held, that, as the bills were sent on account, that meant the then floating account; and his Lordship said, "It is clear that there was a period when the plaintiffs' lien ceased to attach, and when the bills might have been redeemed; but they were not reclaimed; and by allowing them to remain in the hands of the plaintiffs the lien revested, when, upon fresh advances made, the balance in the hands of the plaintiffs the lien revested, when, upon fresh advances made, the balance turned in favor of the plaintiffs.

BEFORE LORD CHIEF JUSTICE ABBOTT.

REX v. TUCKER.

If A. be indicted for perjury, in swearing that he did not enter into a verbal agreement with B. and C. for them to become joint dealers and copartners in the trade or business of druggists; and it appear that in fact B. was a druggist, keeping a shop with which A. had nothing to do; but that A. and C., being sworn brokers, could not trade, and therefore made speculations in drugs in B.'s name with his consent, he agreeing to divide profits and loss with A. and C., this will not support the indictment, as this is not the sort of partnership denied by B. upon oath.

PERSURY. The indictment stated, that William Hallett, on, &c., did exhibit his bill of complaint in the Court *of Chancery, &c., " and that the said bill of complaint was in due manner amended; and that the said William Hallett, in and by his said original and amended bill of complaint, did set forth and show, amongst other things, that in or about the year 1813, he the said William Hallett and Thomas Bowden, and Jonathan Tucker, entered into a verbal agreement to become joint dealers and co-partners in the trade or business of druggists, and the purchase and sale of drugs and merchandizes connected with such trade, and to divide the profits arising therefrom in equal shares and proportions;" and (after stating several other clauses of the bill) "that the said Jonathan Tucker did falsely, &c., depose and swear in writing, amongst other things, in substance and to the effect following, that is to say, Saith, he (meaning himself, the said Jonathan Tucker) denies it to be true, that in or about the year 1813, or at any other time, the said complainant (meaning the said William Hallett) and Thomas Bowden, one of the defendants in the said bill named, (meaning the before-named Thomas Bowden,) and this defendant, (meaning himself, the said Janathan Tucker,) did enter into a verbal agreement to become joint dealers in the trade or business of druggists, and in the purchase and the sale of drugs and merchandize connected with such trade, and to divide the profits arising therefrom;'" and on this the perjury was assigned, "that the said William Hallett, Thomas Bowden, and Jonathan Tucker, did, in or about the year 1813, enter into a verbal agreement 'to become joint dealers in the trade or business of druggists, &c.'" exactly following the words of the answer. Plea-Not Guilty.

The bill and answer were put in; and from the evidence of Mr. Hallett it appeared, that he had for many years carried on an extensive business as a druggist, and had a shop in St. Mary Axe; and that the defendant and Mr. Bowden were drug brokers, and had nothing whatever to do with this shop or the drugs sold there; but that Messrs. Tucker and Bowden were continually stold in the drug market, *and conversant with the state of it; but, being brokers of the city of London, they could not deal in their own names; and it was therefore agreed that they should purchase large quantities of drugs in the name of Hallett & Co. (under which name the prosecutor traded,) and sell them again. Mr. Hallett and Messrs. Tucker and Bowden dividing the profits. Mr. Hallett further stated, that a separate account was kept of the drugs which were bought by Messrs. Bowden and Tucker to be sold in his shop; and that the drugs bought on the joint speculation were bought in his name only, Bowden and Tucker being sworn brokers, and not allowed to buy in their own names; but that on all these latter transactions he and the brokers divided profit and loss.

ABBOTT, C. J., (addressing the counsel for the prosecution)—Is not this case at an end? Your allegation in the bill is, that these parties became partners in

the trade and business of druggists. Mr. Hallett was a druggist by trade: he had a shop and warehouse in which he carried on that trade, and with which the defendant had no concern whatever; but, being a broker, he had an opportunity of knowing what was going on in the trade. Now, he could not buy and sell in his own name; and the account given by Mr. Hallett is, that the defendant was to buy and sell in his (Hallett's) name, and that then they were to divide the profit and loss. Now, I wish to know if that is the sort of partnership alleged in the bill in Chancery: for if this is not such a partnership as is there predicated, there is an end of this indictment. I do not take on me to say, that if a bill had been filed, stating the facts which Mr. Hallett has alleged, that a Court of Equity would not decree an account of such a transaction, because I am not a Judge of a Court of Equity; but I am clearly of opinion, that in your pleadings you must state the partnership as it was. Now this allegation could only apply to an ordinary partnership, and not to such a transaction as this. It *would have been a very different thing if Mr. Tucker had not been a broker, and had not been prohibited from buying in his own name; but, looking at the bill, a person would suppose it was the carrying on of a regular trade; which turns out on the evidence not to be the case. Verdict-Not Guilty.

Gurney, and Adolphus, for the prosecution. Scarlett, Denman, and Platt, for the defendant.

[Attornies—Amory & Coles, and Warne & Son.]

BERRY v. ADAMSON, Gent., One, &c.

If a sheriff's officer send his servant to a party, to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house and execute a bail bond, this is not an arrest.

A person may, on a declaration properly framed, recover for being maliciously held to bail, if he gave bail to prevent being arrested.

In a declaration for a malicious arrest, an allegation that the defendant maliciously caused the plaintiff to be arrested, and to be detained in prison, until, in order to procure his release, he was forced to procure bail, is not a distribute allegation; and if there was a continuous to the procure of any arrest that is not a fifther was a second to the procure of any arrest that is not a fifther was a second to the procure of any arrest that is not a fifther was a second to the procure of any arrest that is not a fifther was a second to the procure of any arrest that is not a fifther was a second to the procure of any arrest that is not a fifther was a second to the procure of any arrest that is not a fifther was a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that is not a second to the procure of any arrest that the procure of any arr giving bail proved, but no evidence of any arrest, that is not sufficient.

Case for a malicious arrest. The first count of the declaration stated that the defendant, not then having any probable cause of action against the plaintiff, &c., and intending to harass, &c., maliciously caused a certain writ, &c., called an attachment of privilege, &c.; and before the delivering of that writ to the sheriff " falsely and maliciously, and without having any reasonable or probable cause of action against the plaintiff, to the amount of 101. or upwards, caused and procured the said writ, and the same was marked and indorsed for bail for 901. and upwards, being so marked and indorsed for bail, the said defendants afterwards, and before the return thereof, to wit, on, &c., at, &c., contriving and intending as aforesaid, and without having any reasonable or probable cause of action whatsoever against the said plaintiff, to the amount of 101. or upwards, falsely and maliciously caused the said plaintiff to be arrested by his body, under and by virtue of the said writ, and to be thereupon imprisoned, and kept and detained in prison for a long space of time, to wit, for the space of three days then next following, and until the said plaintiff, in *order to procure his release from his said imprisonment, was forced [*504 and obliged, and did then and there procure certain persons, to wit.

W. W. and J. C., to become bail for the appearance of him the said plaintiff in the court, &c., to answer, &c. The count then proceeded to state the termination of the suit. The second count was precisely similar, except that it varied the mode of stating the termination of the suit. Plea-General issue.

The affidavit of debt was put in, and also the attachment of privilege, which was indorsed "Oath for 901. and upwards." The bail bend was also put in; but the sheriff's officer stated, that he did not arrest the plaintiff; but that, at the defendant's desire, and to avoid putting the plaintiff to inconvenience, he sent his servant to inform the plaintiff that a writ was out against him, and that he must give bail to it; and the officer further stated, that the plaintiff came to his house with his bail, and executed the bail bond. And it was proved by the officer's servant, that he went to the plaintiff's house and delivered the message as he was directed.

Scarlett, for the defendant. I submit that the plaintiff must be called This is an action for maliciously arresting the plaintiff and holding him to bail. The allegation in the declaration is, that the defendant maliciously caused and procured the plaintiff to be arrested by his body, and imprisoned, till he was forced to give bail to procure his release. The arrest being the gravamen of the charge, all the rest is consequential. Now here, so far from proof of any

arrest, the direct contrary is proved.

Brougham, for the plaintiff. The circumstance that there was no actual arrest, makes no difference. If the plaintiff was held to bail, he was in custody of his bail. No doubt a count might have been framed so as to obviate the objection. But in 2 Wm. Saund. 59 α , it is laid down, that in an action on a bail bond, it is not necessary to lay *an arrest; and that if an arrest *505] is alleged, it would not be traversable.

Abborr, C. J. For the purposes of that action, the party is estopped by his

bond from denying it.

Brougham. If the declaration alleged an arrest and imprisonment, and stopped there, that would be supported by proving that the party was held to bail. Another view of the case that I would submit is this: If your Lordship omit the allegations about the arrest, it will stand thus: That by means of the process, the defendant maliciously forced the plaintiff to procure bail; and if he maliciously caused him to be held to bail, that is enough.

Chitty, and Abraham, on the same side. An actual touching is not now necessary to constitute an arrest. If the party acquiesces in the arrest, it is enough; and here the plaintiff did so by giving bail; and further, the allega tion is divisible; and the maliciously causing a man to put in bail, is of itself

actionable.

Scarlett, in reply. In the case of Arrowsmith v. Le Mesurier, 2 N. R. 211, it was held, that where an officer told a man that he had a warrant against him, and the man went with him to a police office, this was no arrest: and suppose the plaintiff's attorney had sent a bailable writ to the office of the defendant's attorney, and he had put in bail, without the defendant's knowing any thing about it, that would not be an arrest. No doubt, if a man maliciously caused another to sign a bail bond, an action might be framed for that; but here the plaintiff alleges a bodily arrest, and the very contrary is proved.

ABBOTT, C. J. If the allegation of the arrest is left out, the declaration is

hardly intelligible without it.

Scarlett. Your Lordship is not called upon to decide whether a *506] man can maintain an action without being arrested.

ABBOTT, C. J. I have no doubt that a man might recover in an action, if he were held to bail maliciously, and gave bail to prevent being arrested, if the declaration were properly framed.

Brougham. In the case cited, the party went voluntarily before the magis-

trate.

ABBOTT, C. J. In consequence of the warrant which was in the hands of

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the constable. That is a stronger case than the present, as the officer's man, who went with the message in this case, had no warrant. Suppose there had been no writ, or the writ had been set aside, could the plaintiff have maintained an action for false imprisonment? There is a great difference in the gravamen, whether you arrest a man, or tell an officer to send to him to come and sign a bail bond, and not put him to inconvenience. I think the plaintiff must be called.

Nonsuit.

Brougham, Chitty, and Abraham, for the plaintiff. Scarlett, Campbell, and D. F. Jones, for the defendant.

[Attornies-T. W. Robinson, and Adamson.]

In the ensuing Term, Brougham moved to set aside the nonsuit on two grounds: First, That there was a sufficient arrest to support that allegation in the declaration; and secondly, That if there was not, the averment was divisible, and it was sufficient to prove a wrongful holding to bail.

The Court refused the rule on the second ground, being of opinion that the allegation was not divisible; but granted a rule to show cause on the first point: but that rule was, *after argument, discharged, the Court being of opinion that there was no sufficient arrest to support the allegation.

See the case of Russen v. Lucas and Another, aute, Vol. 1, p. 153, and the note to that case.

In the case of Williams v. Jones, Ca. temp. Hard. 301, Lord Hardwicks says, that it does not follow that an arrest cannot be made without touching the person; for if a bailiff comes into a room and tells the defendant he arrests him, and locks the door, that is an arrest; for he is in custody of the officer.

arrest; for he is in custody of the officer.

In the case of Blatch v. Archer, Cowp. 65, Lord Mansfeld lays down, that an arrest must be by the authority of the bailiff, but he need not be the hand that arrests; nor need he be in the presence, nor actually in sight, nor within any precise distance of the person arrested.

MAINWARING v. LESLIE.

If a tradesman bring an action against a husband for goods furnished to his wife, while she was living apart from her husband, it is for him, the tradesman, to show that her so living proceeded from some cause which would justify it.

Assumerr for goods sold and delivered.

The plaintiff was a linen draper, and the demand was for articles bought by the defendant's wife at the shop of the plaintiff. It appeared that the wife at the time was not living with the husband, but residing in lodgings in Panton Street, in the Haymarket; and the woman, at whose house she lodged, proved that several times, both before and after the delivery of the goods in question, she and the witness went together to the defendant's house, where the wife saw him, and stayed there sometimes as long as half an hour.

Scarlett, for the defendant, submitted that the plaintiff must be nonsuited

upon this evidence.

ABBOTT, C. J., assented.

Brougham, for the plaintiff. Is it not for them to show that the wife was

improperly absent from her husband's house? She is proved to have gone there several times, both before and after the purchase of these goods.

*508] *ABBOTT, C. J. It does not appear for what purpose she went on the occasions mentioned. If you furnish goods to a married woman, when she is not living with her husband, it is for you to show, that she was absent from some cause which would justify her absence. She might, for aught we can tell, have gone away of her own accord.

Brougham then called back the witness who had proved the occasional visits; and she said, upon further examination, that the wife once, during the time in which the goods were furnished, left her lodgings at the witness's house, and resided for some time at the house of her husband, but afterwards returned

again to the house of the witness.

ABBOTT, C. J. Upon this evidence I think it stands worse for you than it did before.

Brougham. I submit that this evidence shows, that the public would be justified in concluding that she was living apart from her husband with his consent.

ABBOTT, C. J. I think it is perfectly clear that she was living apart from her husband against his consent, and therefore that the plaintiff is not entitled to recover. If a contrary doctrine were to be holden, many a man might be ruined.

Nonsuit.

Brougham, and Erle, for the plaintiff. Scarlett, for the defendant.

[Attornies-J. Vickery, and Richardson & T.]

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*HOLLIDAY v. MANN et al.

Where goods have been sold by a miller under circumstances which give him the right of refusing to deliver them, evidence of the insolvent state of the buyer's circumstances cannot be received in an action of trover, brought by the indorsee of the bill of lading against the wharfingers of the miller, unless such evidence can be brought home to the knowledge of the plaintiff.

TROVER for flour. The plaintiff claimed under a person named Cant, who had parted with the flour to him, partly in discharge of a debt and partly for cash. Cant was in possession of the bill of lading, which he indorsed to the plaintiff. The defendants were wharfingers to a miller named Branford, of whom Cant had purchased; and the defence was, that Cant had promised to pay for the flour by a Bank Post Bill, but instead of so doing, when he found it had been shipped, sent only his own promissory note; and that the plaintiff had purchased of Cant under circumstances which evinced a knowledge of his (Cant's) inability to pay. In addition to evidence of the plaintiff's having said to the was of no use to bring an action against Cant for non-performance of his contract, because he was not worth two-pence, a witness was called to show the insolvent state of Cant's circumstances.

ABBOTT, C. J., inquired if the facts which the witness was about to prove, could be brought home to the knowledge of the plaintiff. And upon being answered in the negative, his Lordship held that the evidence was not admissible.

Verdict for the defendants.

Campbell, and Abraham, for the plaintiff. Gurney, and C. H. Sheppard, for the defendants.

[Autornies—Harmer, and Mann.]

*HUTTMAN v. BOULNOIS, the Younger.

Γ*510

If a clerk be engaged at a salary of 1001, a year, and having received his wages up to a certain time, serve for some time longer, and then leave the service before the year expires, without due cause, and without any notice; whether he is entitled to recover wages up to the time of his quitting, Quare: at all events, he is liable to a cross action for leaving the service without notice.

Assumpsor for wages as a clerk. There was no evidence of any hiring, but proof was given of a service by the plaintiff for seven months, and also that his salary was to be 100l. a year. Payments had been made him up to the month of November, 1825. He quitted in January, 1826, and sent a letter to the defendant, in the following terms:

"January 3d, 1826.

" Mr. W. Bulnois, Junr.

"Sir,—I sincerely regret being compelled to absent myself from your office, and to resign my present situation. The abruptness with which I do this will, I am aware, be deemed unpardonable, but I have no other course to take, so many things stare me in the face which are undone, and so many difficulties do I anticipate, which I am quite unable to accomplish, that I am in some measure bewildered by the thoughts of them, and unable to perform those duties which require immediate attention. Another cause is of a more personal nature, and relates to the manner of correction, for which I have the greatest dread, &c., &c.

The letter concluded with a statement of the petty cash account, but con-

tained no demand for wages.

Between the day when the plaintiff left, and the 22d March, various applications were made both by himself and his friends, for the payment of his salary, which the defendant uniformly refused to attend to. On the 22d of March, the plaintiff wrote to the defendant, threatening to make known some circumstances connected with his commercial transactions, which would make the defendant regret that he had ever deprived him of his salary. The defendant was stated to be a person of a very violent temper. The sum claimed was 15l., being from the 9th of November, 1825, to the 2d of January, 1826.

*Scarlett, for the defendant. Every species of hiring, where no time is specified, is by law a hiring for a year, and therefore the plaintiff in this case was bound to serve for a year, or show some reason which would justify his leaving earlier. Now the reason which he gives is, that he is unable to perform the duties of his situation. This is the reverse of a suffi-

cient reason; and therefore I submit that he ought to be nonsuited.

ABBOTT, C. J. It appears that the plaintiff leaves his service without notice before the expiration of the year, saying nothing about salary, and claiming nothing at that time. He afterwards threatens his master to expose him if he does not pay him his demand. On both these grounds I am clearly of opinion that he is not entitled to recover.

Campbell, for the plaintiff. There is no evidence to show a yearly hiring.

It is laid down by Lerd Coke, that servants in husbandry are hired by the year. But in other services there is no such law. For instance, in the case of a footman, he is not bound to remain a year in his place, nor is his master obliged to keep him for a year. It is in proof that wages were paid to the plaintiff up to November, 1825, and therefore the presumption of there being a yearly hiring is rebutted, for, in such case, his wages would not be due till the end of the year. Suppose a clerk remains with his employer three hundred and sixty-four days, and then goes away, does he forfeit the whole of his wages by not stopping the remaining day? The plaintiff was hired at the rate of 1001. a year, and he is entitled to a proportion of that sum for the seven months during which he served.

ABBOTT, C. J. I must take it that the hiring in this case was a hiring for a year. The doctrine that a general hiring is a hiring for a year, is not confined to servants in husbandry, but extends also to domestic and other *servants, and it is on that ground that many of our settlement cases are decided. The plaintiff was in the situation of a clerk, and had to maintain himself, and he received the money up to November for the purpose of enabling him so to do. I am of opinion, that having left his service before the expiration of the year, without reasonable cause, he is not entitled to recover any thing.

Nonsuit.

Campbell, and Platt, for the plaintiff. Scarlett, for the defendant.

[Attornies—T. Miller, and P. Lewis.]

In the ensuing *Hilary* Term, *Campbell* obtained a rule *nisi* for setting aside the nonsuit and entering a verdict for the plaintiff, for the sum of 15l.

This rule came on to be argued. Scarlett, A. G., showed cause.—The law implies a hiring for a year, if there be an indefinite hiring. In London, by custom, among domestic servants, they may leave at a month's notice;† but in this case there was no notice at all, and the hiring being a yearly one, neither party can compel the other to perform the contract, unless he himself is willing to perform his own part of it.

Campbell, in support of the rule. I submit that the fair understanding is, that either party might dissolve the contract on reasonable notice; and that if no notice be *given, that will not cause a forfeiture of the by-gone wages, but only make the plaintiff liable to a cross action for leaving the

service without notice.

Lord TENTERDEN, C. J. Had the plaintiff received any wages?

Campbell. He had, my Lord, and I conceive the wages to be payable de die in diem for the plaintiff's support. I will cite what was allowed by Mr. Baron Wood, when at the bar, in a case of Cutter v. Powell, 6 T. R. 323; for what a great counsel admits against his own client, may be taken to be very good law. His words are: "In the common case of service, if a servant, who is hired for a year, die in the middle of it, his executor may recover part of his

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[†] Robinson v. Hindman, 3 Esp. 235. In this case Lord Kenyon held, that if a master turns away his servant without previous notice or warning, and there is no fault or misconduct in the servant to warrant it, the servant is entitled to a month's wages from general usage, without any specific agreement. But if there be misconduct on the part of the servant, he may be discharged without warning, and is not entitled to recover the month's

wages in proportion to the time of service."† And in that case Mr. Justice Lawrence lays down, that with regard to the common case of a hired servant, such servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year.

Lord Tenterden, C. J. As you must admit that the defendant has a right to bring a cross action, would it not *be better to take 151. without costs, [*514

upon the understanding that no cross action shall be brought.

This proposition was acceded to, and the Court directed that the rule should be discharged upon payment of 151., without costs; a stet processus entered, and no cross action brought.

t For the old law, which was otherwise, see Bro. Abr. Apportionment, pl. 13. Ib. Lebergre, pl. 48. Ib. Contract, pl. 31. Worth v. Viner, 3 Vin. Abr. 8 & 9.

In the case of the Countess of Plymouth v. Throgmorton, 1 Salk. 65, the plaintiff declared in debt upon a writing, whereby the defendant's testator had appointed the plaintif's testator to receive his rents, and promised to pay him 100l. per annum for his service. The defendant's testator served three-fourths of a year and died, and the action was brought for 75l. for those three-fourths. Holt, Serjt., objected, that without a full year's service nothing could be due, and that it was in the nature of a condition precedent: and af that opinion were the Court. See the case of Pagaria y Condolf. onte. p. 370. of that opinion were the Court. See the case of Pagani v. Gandolf, ante, p. 370.

PERCIVAL v. BLAKE.

If a person purchases an article, and suffers it to remain on his premises for two months without examination, and then finds it to be unfit for use, he cannot, after that length of time, avail himself of the objection in answer to an action for the price, unless some deceit has been practised with regard to the article.

Assumpsit for goods sold and delivered. Plea-Non assumpsit. The action was brought to recover a sum of 241., as the price of an iron vat.

For the plaintiff, it was proved, that he was a soap boiler, and was also in the habit of buying iron vats at public sales, and disposing of them by private That the defendant, in the month of March, 1825, went to the plaintiff's premises for the purpose of purchasing a vat; that he remained there about ten minutes; that he looked at the vat in question, which was lying on its side in a yard; that the vat was delivered at the defendant's premises; that he did not say it must be warranted sound; and that he had been several times applied to for payment of the price, and made several excuses, and several promises to pay. A letter also from the defendant, dated the 27th of May, 1825, in the following terms, was put in and read:-

"Sir,-I am just come to town, and in answer to your letter of the 10th inst., I can only say, that the amount shall be left out for you on my return from the city to-morrow after 2 o'clock."

For the defendant, the following letter, written by the plaintiff to him on the 21st of January, 1825, was given in evidence:—

"Sir,—Yours, dated January, 20th, 1825, duly came to hand, offering 22. for iron vat, which I cannot *take. It is the finest vat on the ground; the lowest will be 25l., delivered safe and sound. I am well satisfied it will be cheap to you, and I can assure you, with the expenses, it stands me

in 221. 10s. If you look at it again I am sure you will think it well worth your money."

Witnesses were also called, who proved that they went in March, 1825, to look at the vat on the plaintiff's premises. That there were two other vats inside it, which could not easily be removed, and they were therefore unable to examine the inside of the bottom. That there was a good deal of dirt over the outside of the bottom, which prevented the discovery of any imperfection. That in the following May they examined the vat again, and used a hammer and chisel, by means of which they found that the iron work of the bottom, which ought to have been three inches thick, was only three-fourths of an inch, and had also a hole which went quite through. That the thickness of three inches was made up by bricks, covered with cement, and that it was totally unfit for the defendant's business, he being a maker of vinegar and what is called iron liquor, and requiring vats which would stand a very strong heat. It was also proved that the vat never was sound, having missed in casting, and that on that account it was sold for 201. when new; whereas, if it had been perfect, it would have cost 481. That it was cast in 1815, and had been sold to the plaintiff, together with an iron receiver, for 111., at the sale of a Mr. Roobard, on whose premises it had been used for three years, merely as a receiver for cold soap lees. The examination in May did not take place till the day after the letter promising payment was sent; and on that day, when the plaintiff's son called to receive the money, he was told that the vat was unsound, and was requested to send for it back. One of the witnesses stated, that about a fortnight after the defendant bought the vat, the plaintiff told him, the witness, that it was a sound one.

*Abbott, C. J., in his summing up, said—The letter promising payment appears to have been written more than two months after the vat was delivered, and therefore it seems to me that unless the defendant has shown that some deceit was practised, either by the plaintiff himself or some other person, with regard to the vat, his objection comes too late; for a man ought to make his objections within a reasonable time, and I think an interval of two months is too long. His Lordship, after reading and commenting upon the evidence, concluded his observations by saying—The question is, taking all this into consideration, whether a deceit was practised on the defendant, and whether he had not a right, at the time of the purchase, to imagine that he was purchasing an iron vat with an iron bottom, of a competent thickness. Add to this, that the plaintiff in his letter greatly misrepresents the price. If you think that any deceit was practised, then you will find your verdict for the defendant. But if you think that the defendant ought to have found out the state of the vat at the time of sale, or that he ought to have made the discovery earlier, then you will find for the plaintiff, and give him 24l.

The Jury found for the defendant, saying at the same time, that they wished it to be understood, that there was not any wilful misre-

presentation on the part of the plaintiff.

Marryatt, and Campbell, for the plaintiff.

Denman, C. S., and Payne, for the defendant.

[Attornies—Argill & M., and Cranch.]

*REX on the Prosecution of Messrs. JACOB and CAMPBELL v. D. PRINCE.

The statute of the 52 Geo. 3, c. 63, for preventing the embezzlement of securities, by agents, &c., applies only to persons to whom such securities, &c., are entracted, is the exercise of their function or business.

Indictment on the stat. 52 Geo. 3, c. 63, entitled, "An Act for more effectually preventing the embezzlement of securities for money and other effects, left or deposited for safe custody, or other special purpose, in the hands of

bankers, merchants, brokers, attornies, or other agents.

Mr. Jacob, one of the prosecutors, stated, that he was in partnership with Mr. Campbell, and that in the month of October, 1825, Prince, the defendant, came to him in a friendly way, and told him, that as money would soon become rather scarce, if he had any engagements to meet he had better provide the money in time; and added, that if he would draw bills on Mr. Henry Hughes, he (Prince) would get them discounted for him, and hand the money over. He then drew a bill for 1566l. 4s., which Prince got discounted, and paid over the produce. Another bill was then drawn for 16811. 5s., which was given to Prince, to get it discounted, but which he had not returned.

The witness, in his cross-examination, said, that Prince was a general merchant, that he had known him fifteen years, and during that time had had a great many friendly transactions with him, and had given and received accom-

modation to a very large amount.

ABBOTT, C. J. On looking at this act of Parliament, I very much doubt whether it applies to a case like the present; for this is the case of a deposit with a private friend, and the act recites that it is expedient that due provision should be made to prevent embezzlement by persons entrusted by their customers and employers.

*Denman, C. S. The words of the statute include agents; and I submit, with the greatest confidence, that the defendant in this case must be considered as an agent for the purpose of getting the bill discounted.

Platt, on the same side. If the Legislature had had this particular case in view, the words used could not have been more general. The enacting part does not refer to the recital. The words there used are not "agents of the description aforesaid," but they are " agent or agents of any description whatsoever." If it was not intended *to apply to a case like this, then [*519 those general words might have been left out.

† The words of the recital are: "Whereas it is expedient, that due provision should be made, to prevent the embezzlement of Government and other securities for money, plate, jewels, and other personal effects, deposited for safe custody, or for any special purpose, with bankers, merchants, brokers, attornies, and other agents, entrusted by their cus-

tomers and employers."

1 The enacting part in the first aection is—"That if any person or persons, with whom (as banker or bankers, merchant or merchants, broker or brokers, attorney or attorney. or agent or agents of any description whatsoever) any ordinance, debenture, exchaquer bill, navy, victualling or transport bill, or other bill, warrant or order for the payment of money, state lottery ticket or certificate, seaman's ticket, bank receipt for payment of any money, state lottery ticket or certificate, seaman's ticket, bank receipt for payment of any loan, India bond or other bond, or any deed, note or other security for money, or for any share or interest in any maticaal stock or fund of this or any other country, or in the stock or fund of any corporation, company or society established by act of Parliament or royal charter, or any power of attorney for the sale or transfer of any such stock or fund, or any share or interest therein, or any plate, jewels or other personal effects, shall have been deposited, or shall be or remain for safe custody, or upon or for any special purpose, without any authority, either general, special, conditional or discretionary, to sell or pledge such debenture, bill, warrant, order, state lottery ticket or certificate, seaman's ticket, bank receipt, bond, deed, note or other security, plate, jewels or other personal effects, or to sell, transfer or pledge the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, shall sell, negotiste, transfer, assign, which such security or power of attorney shall relate, shall sell, negotiate, transfer, assign, pledge, embezzle, secrete or in any manner apply to his or their own use or benefit, any such debenture, bill, warrant order, state lottery ticket or certificate, seaman's ticket,

ABBOTT C. J. From the expression of the object of the act of Parliament, as described in the recital, it seems to me that it was the intention of the Legislature to apply the criminal remedy to the case of persons, who, in the exercise of their function and business, should been trusted with securities, &c. question is, whether persons materially assisting and accommodating each other are within the act. On the part of the prosecution, it is said, that if the words "agent or agents of any description whatsoever," were not meant to apply to all cases, they might as well have been left out; but on the other hand, it may be said, that if the statute was intended to apply to all persons as agents, then the words "bankers, merchants, brokers and attornies," might have been omitted altogether; and they would have been so, if it had not been intended to confine the provisions of the statute to the cases there mentioned. I am of opinion that this case is not within the particular act of Parliament. It is always important to see that cases of such a description are brought, not merely *520] within the letter, but within the spirit *and meaning of the act, before a party is pronounced to be guilty.

The Jury then, under his Lordship's direction, found the defendant

Not Guilty.

Denman, C. S., and Platt, for the prosecution. Scarlett, and Andrews, for the defendant.

[Attornies—Harmer, and Kearsey.]

bank receipt, bond, deed, note or other security, as hereinbefore mentioned, plate, jewels or other personal effects, or the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, in violation of good fatth, and contrary to the special purpose, for which the things hereinbefore mentioned, or any or either of them, shall have been deposited, or shall have been or remained with or in the hands of such person or persons, with intent to defraud the owner or owners of any such instrument or security, or the person or persons depositing the same, or the owner or owners of the stock or fund, share or interest, to which such security or power of attorney shall relate, every person so offending in any part of the United Kingdom of Great Britain and Ireland, shall be deemed and taken to be guilty of a misdemeanor, and being thereof convicted according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on a person or persons guilty of a misdemeanor, and as the Court before which such offender or offenders may be tried and convicted shall adjudge."

By the stat. 7 & 8 G. 4, c. 27, this act is repealed, but by the 7 & 8 G. 4, c. 29, its provi-

sions are in substance re-enacted.

BEFORE MR. JUSTICE BAYLEY.

(Who sat for the Lord Chief Justice.)

BURTON v. PAYNE et al.

If a check drawn by one of the parties in a cause, be proved to be in the hands of the banker of such party, (having been paid,) the opposite party need not, if he wishes to have it put in evidence, call the banker's clerk to produce it, but may call for it under a notice to produce.

Assumpsit.—The question in dispute in the cause was as to the partnership of the defendants.

To show a joint payment by them, Gurney, for the plaintiff, called for the production of a check, which a witness stated was in the hands of the defendant's bankers.

Scarlett, for one of the defendants, objected, that the plaintiff's counsel ought

to call the banker's clerk to produce it.

BAYLEY, J. The bankers are your agents. You would have a right to go to the bankers and demand the check of them.

Gurney, for the plaintiff. Scarlett, for the defendant.

[Attornies-Golding, and Sloper.]

*BEFORE LORD CHIEF JUSTICE ABBOTT.

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REX on the Prosecution of WILLIAM CLARK v. RICHARD DIXON MOTT, WILLIAM IRELAND, and PETER STAINSBY.

If persons conspire to fabricate shares in addition to the limited number of which a joint stock company, according to its rules, consists, in order to sell them as good shares, they may be indicted for it, notwithstanding any imperfection in the original formation of the Company.

Whether scrip receipts given by the bankers of such a Company in return for sums paid as deposits, can be properly described as shares in the indictment—Quere.

The indictment, which consisted of twenty-four counts, in the first nineteen stated, in substance, that a certain joint stock Company had been established, called the Imperial Plate Glass Company, the capital of which, it had been ordered and appointed, should consist of 2000 shares; and went on to charge the defendants with conspiring to make and fabricate a great number of other shares in addition to the said 2000, with intent to defraud the prosecutor. The twentieth count was in the future tense, and treated the Company as one to be formed, and the shares as to be fabricated. The twenty-first count charged the defendants with conspiring by false pretences, (without stating them,) to get into their possession certain money of the prosecutor.

From the evidence it appeared, that the Company had not been legally established; and that the papers which the defendants were charged with cospiring to fabricate, were scrip receipts given by the bankers of the Company to the holders of certain letters, in return for the payment of deposits.

Scarlett, on the part of the defence. The indictment supposes a Company legally formed, and shares legally issued, and every count calls them shares,

not intended shares, or scrip receipts.

ABBOTT, C. J. I am not prepared to say, that although the Company might not be well constituted, yet that a fraud committed in connection with it might not be punished by prosecution.

Scarlett. But I submit that there were no shares.

*Nenman, C. S., for the prosecution. I rely on the twentieth count, which states, that a certain Company had been proposed and proje ted.

And as to the scrip receipts being called shares, the parties all along treated

them as shares; and in a case of fraud that is sufficient.

Starkie, on the same. There is a count charging the conspiracy to be by false pretences without using the word shares. The letters and the scrip receipts are only evidence of the false pretence. If it was intended that the parties, by means of letters and scrip receipts, should have shares, that will be sufficient. The gist of the offence is the conspiracy, and that is ultimately to create a number of shares; therefore the fabrication of shares need not be

ABBOTT, C. J. I think I ought not to stop the prosecution on this objection; but, speaking as a lawyer, I should say, that these receipts had not become

shares, but were only things which might be made shares.

Other witnesses were then examined, from whose evidence it appeared that the receipts which the prosecutor was to have, were not in addition to, but part of the 2000.

ABBOTT, C. J., in summing up to the Jury, (inter alia,) observed—One part of this indictment charges the defendants with conspiring to make more shares, in addition to the 2000; and if, in point of fact, a combination to that effect were made out, I should say, as at present advised, that, in point of law, such conduct constituted an offence punishable in a criminal way, notwithstanding the original imperfection of the Company's formation.

The facts were then left to the Jury, who found the defendants

Not Guilty.

*Denman, C. S., and Starkie, for the prosecution. •5237 Scarlett, Adolphus, F. Pollock, and Brougham, for defendant Ireland. Gurney, and Campbell, for defendant Stainsby. Holt, and E. Quin, for defendant Mott.

[Attornies—Bicknell & Co., and Green & A.]

WIDGER v. BROWNING.

If notice of disputing an act of bankraptcy be served on the clerk of the assignee, at his counting house, that is a good service of it.

Trover for goods, which had belonged to the plaintiff, and were taken by the defendant as assignee, under a commission of bankrupt, dated June 19th, 1823, which had been issued against the plaintiff. The present action was brought to try the validity of that commission.

Notice of disputing the act of bankruptcy had been left with a clerk of the

defendant at his counting house, before issue joined.

Wilde, Serjt., for the defendant. I submit that this is not a good service of the notice. It was held in the case of Howard v. Ramsbottom, that the service must be personal; and if the service of the notice is insufficient, it will not be necessary to give any evidence of the act of bankruptcy, since the stat. 6 Geo. 4, c. 16.1

^{† 5} Taunt, 524. In this case the Court said, that leaving a notice of intention to dispute the act of bankruptcy with the maid-servant of the assignee, was not a good service of it, but that a service on the attorney of the assignee was sufficient. That case was on the stat. 49 Geo. 3, c. 191, (now repealed,) but the 'wording of the stat. 6 Geo. 4, c. 16, s 90, is not materially different on this point.

‡ By which it is enacted, (s. 90,) "That in any action by or against any assignee, or in

*Scarlett, contra. It is a general rule, that personal service is only necessary where it is to bring the party into contempt, or where it is to be the foundation of a criminal proceeding.

ABBOTT, C. J. I think that the service in the present case is sufficient.

Parol evidence was then given of an act of bankruptcy; and the plaintiff was

Nonsuited.

Scarlett, and Campbell, for the plaintiff.
Wilde, Serjt., F. Pollock, and Perring, for the defendant.

[Attornies—Orchard, and Fyson & B.]

any action against any commissioner or person acting under the warrant of the commissioners for any thing done as such commissioner, or under such warrant, no proof shell be required at the trial of the petitioning creditor's debt or debts, or of the trading or act er acts of bankruptcy, respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried, may (if he thinks fit) grant a certificate of such proof or admission, and such assignee, commissioner, or other person shall be entitled to the costs to be taxed by the proper officer, occasioned by such notice, sad such costs shall, if such assignee, commissioner, or other person, shall obtain a verdict, be added to the costs, and, if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person."

*TAYLOR v. BRIGGS et al.

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of a word has acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting that trade; but, that the word has acquired that particular meaning must be distinctly proved.

has acquired that particular meaning must be distinctly proved.

If one construction of a charter party be much in favor of one of the parties, and an opposite construction equally in favor of the other, the evidence of the broker through whom it is entered into, as to what was said at the time of its execution, is of too dangerous a nature to be much relied on.

Assumpser on a charter party. The whole question was as to the meaning of the words "Cotton in bales."

For the plaintiff, it appeared, that the cotton in question was to be brought from Alexandria to Liverpool; and it was proved, that if a quantity of cotton be put simply into a bag, it is called a bag of cotton; but that if after that it be compressed into a cubical form, so as to take less room, it is then called a bale.

For the defence, it was proved, that although what had been stated by the plaintiff's witnesses was correct as to cotton brought from Calcutta, yet that the trade in cotton between Liverpool and Alexandria being only of three or four years' standing, there are no means of pressing the bags there; and in consequence the terms bag and bale are used indiscriminately, as meaning the unpressed bag of cotton; and in further proof of this, the bill of lading was put in, which stated the cargo to be 1400 bales of cotton, although they were in fact unpressed. And the broker through whom the charter party was entered into, gave evidence of what was said at that time.

ABBOTT, C. J. The important point here is as to the meaning of the word sale, one party contending that it means a compressed bale; the other party, that it means a bag. If the word bale had acquired a particular meaning is regard to the trade of *Liverpool* and *Alexandria*, I should consider that that

meaning should apply in this case; but there should be distinct evidence that the word has that particular meaning. With regard to the Surut bales, it is quite clear that they are compressed. The broker has given evidence of something that was said at the time; but I think that if there be a written instrument signed by the parties, and a particular construction of it will much benefit one party and injure the other, that sort of evidence is of too dangerous a nature to *b26] be *relied on; and the question I shall leave to the Jury is—what was meant by the term bale?

The Jury, which was special, found, that a bale means a compressed bale. Scarlett, Marryatt, and Campbell, for the plaintiff.

Tindal, S. G., and F. Pollock, for the defendants.

[Attornies—G. Smith, and Oliverson.]

In the ensuing Hilary Term, Tindal, S. G., obtained a rule nisi for a new trial, on payment of costs, for the purpose of adducing further evidence; but that rule was afterwards discharged.

See the case of Wood, Assignee of Hall, v. Wood, ante, vol. 1, p. 59.

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER, AFTER ADJOURNED MICHAELMAS TERM, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

LINDSAY . LIMBERT.

An assignce of a lease under the Insolvent Debtors' Act, is entitled to a reasonable time in which to decide whether he will accept the lease or not, and during that time he may take such steps as he may think necessary for the purpose of trying to render the property productive.

COVENANT for rent. The declaration stated a lease from the plaintiff to a person named Biddle, dated the 23d of September, 1823; and then alleged, that after the making of the said lease, and during the term thereby granted, to wit, on the 19th of December, 1825, all the estate, &c., of Biddle in the premises demised, with the appurtenances, by assignment thereof then and there legally made, came to and vested in the defendant: whereupon and whereby the said defendant then and there entered into and upon all and angular the said demised premises, and became and was possessed thereof, and *continued so thereof possessed from thence until and at and after the time the rent thereinafter mentioned became due and payable, &c.

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The plea was, that the estate, &c., of Biddle, in the said demised premises in the declaration mentioned, by assignment thereof legally made, did not come to and vest in the defendant in manner and form as the said plaintiff had in his

declaration alleged.

The defendant was the assignee, under the Insolvent Debtors' Act, of Biddle the lessee. The assignment to him under the act was made on the 19th of December, but the defendant did not totally abandon his connection with the lease and premises till the 17th of May following; and in the interval he tried to let the premises, but was not successful. There was contradictory evidence as to whether he had accepted the lease in an unqualified or merely a conditional manner.

Wilde, Serit., for the defendant, cited the case of Copeland v. Stevens, and contended that under the stat. 1 Geo. 4, c. 119, an assignee was entitled to a reasonable time for the purpose of considering whether he would accept of the

lease.

Taddy, Serjt., for the plaintiff, contended that the only question was one of possession, which was admitted by the defendant's plea, inasmuch as that plea only negatived the assignment and not the possession. He cited Croft v. Peck.1

*Brst, C. J., left it to the Jury to say, First, whether the defendant had or had not accepted the lease conditionally, in order that he might see if he could turn it to any advantage; and Secondly, if he had so done, whether the time he had kept it was a reasonable time, for the purpose of secing what he could do with it.

The Jury found for the defendant, establishing the conditional acceptance, and the reasonableness of the time. Leave was given to the plaintiff to move

to enter a verdict.

Taddy, Serjt., and D. Pollock, for the plaintiff. Wilde, Serjt., and Comyn, for the defendant.

[Attornies-Spike, and H. H. Drancombe.]

In the ensuing Hilary Term, Taddy, Serjt., moved, pursuant to the leave given. In addition to the cases cited at the trial, the case of Turner v. Richardson, 7 East, 335, was mentioned.

The Court said, that the case of Croft v. Peck was not in point, as it was decided on the ground that the provisional assignee, being the public officer of the court, had no discretion; and that Turner v. Richardson was precisely in point.

† 1 B. & A. 593. The Court there decided that "the general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate, rents, &c.; and therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy."

† 8 Moore, 384. In that case it was held that the provisional assignee of the Insolvent Court, being a public officer, must, by the mere fact of the assignment to him, be taken to have accepted all the interest the insolvent had in his necessary and one of the large of the large

to have accepted all the interest the insolvent had in his property so assigned.

HUBERT, Gent., one, &c., v. MOREAU.

A person, after he became bankrupt, and before he had got his certificate, called at the office of his attorney to whom he was indebted, and wrote there, the attorney not being at home, a letter promising to pay him a sum of 100l. The only signature was a flourish of the pen, which it was contended by the plaintiff formed the letter M. the initial letter of the defendant's name: Held, that if it was an M., it was not a sufficient signature under the statute, 6 Geo. 4, c. 16, s. 131. Semble—that if such a letter be without date, the time when it was written cannot be proved by parol evidence.

Assumestr for work and labor. Pleas-First, non assumpsit; and second, that the defendant became *bankrupt on the 4th of July, 1826. The plaintiff was an attorney, and the defendant a Frenchman, named Pierre Armand le Comte de Fontaine Moreau. It appeared that the defendant, being indebted to the plaintiff for business done, called at his office, and wrote a letter in French, which he left for the plaintiff, he not being at home. The letter requested the plaintiff not to be angry at the defendant's not bringing him any money, mentioned an expectation of getting some by an arbitration which was then in progress, and concluded with a passage, of which the following is a translation: "I can, however, assure you for certain, that before the 15th of next month, I shall be able to let you have 100l." This letter was not dated, and the question of fact in the cause was, at what time it was written; it being contended on the part of the plaintiff that it was written on the 23d of August: and on the part of the defendant, that it was written on the 31st of May. In the first case it would be after, and in the second before the defendant's bankruptcy.

For the purpose of showing that it was written on the 23d of August, a clerk of the plaintiff's was called, who stated that he was present on that day

while the defendant was writing it.

Wilde, Serjt., for the defendant, objected to this mode of supplying the date by parol. By the 6 Geo. 4, c. 16, s. 131,† it is provided, that a bankrupt shall not be liable upon any promise to pay a debt discharged by his certificate,

•5301 unless such promise be in writing. The equestion as to when the letter

was written is the material fact in the cause, and that fact is sought to be proved by parol, in the very teeth of a statute which guards so carefully against proving the promise by parol. If such evidence is allowed, it will open a door to fraud, by giving a party in possession of a letter written before a bankruptcy, the opportunity of insisting that it was written after.

Best, C. J. The strong inclination of my opinion is, that this is a good objection; but I will not decide it here; but let the cause go on, and leave it

for the decision of the Court.

The letter had no name attached to it, but something that looked like an M.; and Wilde, Serjt., contended that it could not be said to be signed as required

by the statute. It was handed to

BEST, C. J., who, upon looking at it, observed—It may be an M., or it may be a waving line: but if it be an M., I am of opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name. I have no doubt upon the subject; but for the sake of the character of the parties I will allow the cause to go on.

Tuddy, Serit. Perhaps your Lordship will allow us to produce evidence to

show, that the defendant usually signed in that way.

[†] The section is as follows:-"And be it enacted, that no bankrupt after his certificate Y The section is as follows:—"And be it enacted, that no bankrupt after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any dobt, claim or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim or demand, upon any contract, promise or agreement made, or to be made after the suing out of the commission, unless such promise, contract or agreement be made in writing, signed by the bankrupt, or by some per son thereto lawfully authorised in writing by such bankrupt."

BEST, C. J. No, I will not.

Wilde, Serjt., then further objected, that the promise contemplated by the statute, was one to be made after a man had obtained his certificate, and not before, when he was not discharged from his legal liabilities.†

*BEST, C. J. I think that as the statute is penned, any promise having the requisites of the act, made after the bankruptcy, will not be

discharged by the certificate.

A Frenchman, who was called as a witness, stated, on being shown the letter, that in his opinion the mark which was taken to be an M., was nothing but a flourish.

Upon this BEST, C. J., said, that he would nonsuit the plaintiff; but that, for the sake of the character of the parties, he would take the opinion of the Jury upon the question of fact, as to when the letter was written.

This question was accordingly submitted to them, and the Jury found that

the letter was written on the 23d of August.

Nonsuit, with leave to move.

Vaughan, and Taddy, Serjts., and Abraham, for the plaintiff. Wilde, Serjt., and Justice, for the defendant.

[Attornies-Hubert, and Fisher & S.]

In the ensuing *Hilary* Term, *Vaugha*, Serjt., moved, pursuant to the leave given. He cited the case of *Schneider* v. *Norris*,‡ and contended that the M. was a sufficient signing within the act, it being the sign used by the party, to denote that the instrument was his.

The Court refused a rule.

† He also objected, that the promise in the letter was not a promise to pay the original debt, which alone would support the action, but a special promise to pay 100% on the 15th of the next month; but upon this objection no decision was given.

of the next month: but upon this objection no decision was given.

† 2 M. & S. 286. In that case a bill of parcels, in which the name of the vendor was printed, and that of the vendee written by the vendor, was held to be a sufficient memorandum of the contract, within the statute of frauds.

*ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1826, ·

PROCTOR v. JONES.

The marking by the vendor, of casks of wine lying in the docks, with the initials of the purchaser, at his request, and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance under the 17th section of the statute of frauds.

Assumpser to recover the price of a quantity of wine. The plaintiff's clerk proved that he went with the plaintiff and defendant to the London Docks.

for the purpose of the defendant's tasting some wine of the plaintiff's. After several sorts had been tasted, and the prices mentioned, the defendant agreed to take two casks of Port, and directed the witness to mark them with the initials of his name, that no mistake might occur. On being asked his initials by the plaintiff, he said they were T. J.; and T. J. was then marked on the casks by the witness in the defendant's presence: a third was afterwards marked in the same way. The plaintiff then left; and the witness and the defendant went towards another warehouse to see some Cape wine; and while they were going, the defendant said, that he had laid out a good deal of money in gin, and should want some time for the wine. The witness told him he might have two menths, and he said that would do very well. The defendant then said that he had several cases in the Court of Requests, and he must go there, or he should be nonsuited, but added, that the witness knew what would suit him; and he left it to him to select for him both with regard to the quality and price.

For the plaintiff, the case of Anderson v. Scott was cited.

*Wilde, Serjt., for the defendant. An act done by the vendor, is not an act which will bind the purchaser under the statute of frauds. There was no contract at the time of marking; the contract was made afterwards: marking is not sufficient. Anderson v. Scott has been considered a very strong case. The words of the statute, 29 Car. 2, c. 3, s. 17, are, that "no contract for the sale of any goods, wares, and merchandizes, for the price of 10% sterling, or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, &c." It does not appear in what condition the wines were at the Docks, to what order they were deliverable, or to what liens they were subject. What occurred cannot be said to be equivalent to an actual receipt, when it does not appear that the purchaser had any control over the wine.

Hutchinson, on the same side, referred to the cases of Farebrother v. Simmons, Baldey and Another v. Parker, and Thomson v. Maceroni.

*Vaughan, Serjt., in reply, contended, that the proposition was a monstrous one, which was sought to be maintained on the part of the desendant. He cited Elmore v. Stone.

BEST, C. J. That case has been overruled.

Vaughan, Serjt. Could the plaintiff have had a right, if he had heard of

†1 Camp. N. P. C. 235 n. That case was special assumpsit for the non-delivery of wines; and Lord Ellenborough held, that the cutting off the pegs by which the wine was tasted, and the marking of the plaintiff's initials on the casks by the defendant's agent, in the presence of all the parties, amounted to a delivery under the statute of frauds.

†5 B. & A. 333. The point decided in that case is, that the agent contemplated by the

17th section of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, if an auctioneer write down the defendant's name, by his authority, opposite to the lot purchased, such entry is not sufficient, in an action brought in the name of the auctioneer, to take the case out of the statute.

\$2 B. & C. 37. Assumpsit for goods sold. The plaintiffs were linen-drapers; and the defendant came to their shop and bargained for various articles. A separate price was agreed on for each, and no one article was worth 10t. The defendant marked some with a pencil, helped to cut others from the bulk, and some were measured in his presence. a pencil, helped to cut others from the bulk, and some were measured in his presence. A bill of parcels was, at his desire, sent with the goods; he refused to accept them. It was decided that there was but one contract for the whole, and that there was no delivery and acceptance of any part of the goods, and therefore that the case was within the statute of frauds. S. C. 3 D. & R. 220.

\$\text{\$\text{\$\text{\$3\$}}\$ B. & C. 1. In this case, goods of the value of 1441, were made to order, and remained in the possession of the vendor, at the request of the vendee, with the exception of a small part, which the vendee took away; and it was held, that there was no acceptance of the residue of the goods within the statute of frauds. S. C. 4 D. & R. 619.

\$\text{\$\text{\$1\$}\$ T T aunt. 458. The point there decided is, that "if a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods within the statute of frauds."

within the statute of frauds.

the insolvency of the vendee, to say there was no delivery? There was a

symbolical delivery.

Manning, on the same side. The case of Baldey v. Parker is distinguishable from this, because there the goods were capable of delivery; but here they were not, partly on account of their bulk, and partly on account of the neces-

sity of previously paying the duty.

The statute of frauds and the statute of limitations were both so much objected to at the time when they were passed, that the judges appeared anxious to get them off the statute-book; but in later times they have become desirous to give them their full effect. I think the statute of frauds is a good and wholesome statute. In other countries, contracts are made in writing. If my Lord Ellenborough's opinion in the case of Scott v. Anderson was an opinion upon a matter of common law, I should act upon it; but it is on the construction of a statute; and the words of the statute are against it. It is the intention of the statute, that there should be as complete a delivery as can be according to the nature of the article. It cannot be said in the present case, that the defendant actually received the goods. Could the vendee *maintain trover if the goods were not delivered !- Certainly he could not, for the seller would have a lien on them for the price, as there was no stipulation as to payment at a future time. But not only was there no delivery, but there was no complete contract at the time of the marking; for at that time the time of payment was not agreed upon; but it was settled in a conversation afterwards. If there was no complete contract at the time of the marking, then the marking cannot be an acceptance under the statute. If the plaintiff had made a transfer in the Dock books, that would, in my opinion, have been a symbolical delivery. I think, looking to the words of the statute, that I am bound to call the plaintiff.

Nonsuit.

Vaughan, Serjt., and Manning, for the plaintiff. Wilde, Serjt., and Hutchinson, for the defendant.

[Attornies-Boxer, and Harmer.]

RUTHVEN v. BROWN, Esq.

A prisoner in the Fleet Prison had obtained a day-rule in the usual form, permitting him to go abroad to transact his affairs and advise with his counsel, and to return the same day. He went to Sadler's Wells Theatre, where he was seen as late as half past 11 in the evening:—Held, that if he returned within the ambit of the prison before 12 at night, the Warden could not be liable in an action for an escape, notwithstanding the abase and misapplication of the rule.

The declaration stated, that the plaintiff, in Easter term, 5 Geo. 4, recovered against James Haselden, 231l., as his damages, as by the record and proceedings thereof more fully appeared; and that on the 20th of November, in Michaelmas Term, 1824, the said James Haselden, then being in the custody of the defendant, as Warden of the Fleet Prison, was brought to the bar of the Court of Common Pleas, and re-committed thence in execution. It then alleged a further bringing up and a remand on the 24th January, 1825, and then went on to state, that afterwards, to wit, on the 10th of June, 1825, the defendant permitted Haselden to escape from his custody, the plaintiff being then unsatisfied of his damages, by reason of which an action

accrued to the plaintiff to demand and have from the defendant the said sum of 2311. The pleas were nil debet, and several special pleas of justification; one of which was, that on the said 10th of June, 1825, a certain rule or order was made by the Court of Common Pleas, whereby it was ordered, that the said James Haselden should have leave to go abroad that day out of the said prison of the Fleet, to transact his affairs, and advise with his counsel, and to return to the same prison the same day, according to the form of the statute in such case made and provided. The plea then alleged that the said James Haselden did return to the said prison, and into the custody of the defendant, as Warden, on that day, pursuant to the rule. To this the plaintiff replied, that the said James Haselden did not return to the said prison, and into the custody, &c., pursuant to the said rule, in manner and form as alleged in the plea. This replication concluded to the country, and issue was joined upon it.

An examined copy of the record of the judgment in the cause of Ruthven v. Haselden was produced, from which it appeared that it was of Michaelmas

Term.

The defendant's counsel objected, that, as the declaration stated, that the

judgment was recovered in Easter Term, there was a variance.

The plaintiff's counsel, in answer to the objection, cited the cases of Purcel v. M. Namara, 9 East, 157; and Stoddart v. Palmer.†

BEST, C. J. Upon the authority of Stoddart v. Palmer, I am of opinion, that it is no variance.

Proof of the remand and commitment of Haselden under the writ of Habeas

Corpus, was then given.

An order of Mr. Justice Park, made on the 4th of November, 1825, requiring the plaintiff to furnish a particular in writing, of the days and times on which he meant to insist that Haselden escaped, and also an order of the same learned Judge confining him to the 28th of November, 1824, the 30th of January, 1825, and the 10th of June, 1825, being the three times mentioned in the particular.

A witness was called, who proved, that on the evening of the 10th of June, 1825, he saw Huselden at Sadler's Wells Theatre, which place they left at

the same time, viz., between a quarter and half past 11 at night.

On the 11th of January, 1825, a written notice was served on the defendant, signed by the plaintiff's then attornies, stating that Haselden had been seen at Kensington, and threatening an action if the defendant did not lock him up.

A witness was also called, who stated, that on the 7th of March, 1825, he accompanied the plaintiff to the defendant's, and had an interview with him: the plaintiff said, that he was come to give notice that Haselden had again been seen out of the rules; that he had been seen in Surry by a Mr. Pearson, who would tell the defendant when it was, if he would call upon him. The plaintiff also desired that the defendant would bring Haselden within the walls. The defendant said, that he should not call on Pearson, but if Pearson would call on him, he would hear what he had to say; and that he should not deprive Haselden of the rules, as he had given security and had paid for them.

*538] *The plaintiff said, that he should proceed against the defendant if Haselden was again seen out of the rules. The defendant said he might do as he pleased, for he was well secured, and should not bring him

within the walls.

Haselden had been discharged out of custody by a Judge's order, on payment of the debt, but without prejudice to the plaintiff's action.

^{† 3} B. & C. 2, and 4 D. & R. 624. Action for a false return to a feri facias. The declaration stated, that the plaintiff in Trisity Term, 2 Geo. 4, by the judgment recovered, &c., concluding with the words, "as appears by the record." The proof was of a judgment in Easter Term, 3 Geo. 4. It was held that this was no variance, for that the averaged, "as appears by the record," was surplusage, and might be rejected, inasmuch as the judgment was not the foundation of, but mere inducement to, the action.

For the defendant, the day-rule, of the 10th Jame, was put in, (an objection that it was admitted by the terms of the replication having been overruled.) It was in the usual form.

Witnesses were then called to show that Haselden was at his lodgings within the rules before 12 at night on that day, but their testimony was mate-

rially shaken on their cross-examination.

Vaughan, Serjt., for the defendant. It has been decided that a day rule operates for the entire day. The most liberal and ample construction has been put upon the permission of the Court. Field v. Jones.† When Haselden was coming from Sadler's Wells, he was under the protection of the law, and had

a right to go where he pleased. There was no escape.

Bosanquet, Serjt., for the plaintiff. The object of a day rule is, that a man may transact his business, and advise with his counsel; these are the terms of the order: but a man is not allowed to be out till past 11 at night, and to amuse himself by going to theatres. The business of the Courts is over long before that hour. Though the witnesses should be believed, who swear that Haselden was at home before twelve, yet as he was not out for the purposes mentioned in the rule, that is no justification. The plea says, he returned in pursuance of the rule; but we deny that in our replication. There is a rule of the Court of King's Bench, of the 30th Geo. 3, mentioned in 3 T. R. 584, that every prisoner of that Court having a day-rule, shall return within the walls or the rules at or before 9 o'clock at night; that is the reasonable and proper time, and I apprehend that my Lord Chief Justice will consider that rule as affording a reasonable construction of the law upon the subject, and apply such construction to the day-rules of the Court of Common Pleas. With respect to the case cited of Field v. Jones, it has nothing to do with this point.

BEST, C. J. As to the law upon the subject, I am of opinion that the Warden is not answerable for the abuse of the order of the Court. Haselden obtained the day-rule by fraud. It was not obtained for the purposes of business, but to enable him to pursue, at the expense of his creditors, amusements which, in him, were highly criminal. But that arose from a defect in the rule of our Court. The Warden was bound to obey that rule, and is not answersble for any misuse of it by the party obtaining it, provided such party returned within the ambit of the prison before twelve at night. I cannot take the rule of the King's Bench as an exposition of the general law, but as itself creating a new law; and therefore I think the only question is, did this man return within the rules before twelve at night on the 10th of June? We can improve upon the rule of the King's Bench, and make an order not only that a party shall return at nine o'clock, but also that he shall not be at liberty to go to public places of amusement. But unfortunately, at present, we have no such There is a case in the King's Bench, Bonafous v. Walker, 2 T. R. 136, which decides that going beyond the rules is not an escape. But if the Warden, after notice that a man has been abusing his privilege, by going beyond the rules, does not think it right to lock that man *up, I, for one, shall require a very long argument to convince me, that it is not a negligent or voluntary escape. And I am of opinion, that if such notice be given, it is the duty of the Warden to make enquiry into it, for if the information is true, he will be liable. His Lordship then left it to the Jury to say, whether, in fact, Haselden returned before twelve at night, telling them, that if they thought he did not, they must find a verdict for the plaintiff; but with nominal damages only, as the original debt and costs had been paid.

The Jury found for the plaintiff.

^{† 9} East, 151. This case decides that a day-rule, when made, covers, by relation back the liberation of a prisoner who had signed the petition, but had gone out of the prisone before the sitting of the Court on the same day, though the marshal were seed for that escape, which occurred before the sitting of the Court.

Bosanquet, and Taddy, Serjts., and Perring, for the plaintiff. Vaughan, Lawes, and Wilde, Serjts., for the defendant.

[Attornies—E. Isaacs, and Pullen.]

This decision was confirmed by the Court, in the following Term; and a rule was subsequently made requiring all persons to whom day rules should be granted to return within the rules by nine o'clock in the evening.

ADJOURNED SITTINGS AT LONDON, AFTER MICHAELMAS TERM, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

GRESHAM v. POSTAN.

In an action on the case for a breach of an express warranty, that a horse was quiet; if the declaration allege that the defendant well knew him to be unquiet, this is an unnecessary averment, and need not be proved.

Case for falsely warranting a horse to be quiet in harness. In the declaration it was averred, that the defendant well *knew* the horse to be unquiet in harness. No evidence was given of the *scienter*.

*Wilde, Serjt., for the defendant, contended, that although it might be unnecessary to aver this in the declaration; yet as it was so averred,

the plaintiff could not recover without its being proved.

Vaughan, Serjt., and Kelly, contra. It is clearly an unnecessary and superfluous averment. If it was not, the declaration would never be perfect without it; and if we prove all the averments that are necessary to support our action, that is enough, and we are entitled to recover.

BEST, C. J. It is certainly unnecessary to allege that the defendant knew the horse to be unquiet; and it being unnecessary to allege it, it need not be

proved.

Verdict for the plaintiff.

Vaughan, Serjt., and Kelly, for the plaintiff. Wilde, Serjt., and Moody, for the defendant.

[Attornies - Gresham, and Scarth.]

For the usual form of declaring in case on an express warranty, see 2 Chitt. Plead. 316 and see Horncastle v. Moat, ants, Vol. 1, p. 166.

BUSZARD et al., Assignees of JONES et al., Bankrupts, v. CAPEL

Barges lying in a river close to a wharf, and fastened to piles, intended partly for the support of the wharf, and partly that barges may be attached to them, may be distrained for rent due in respect to the wharf, they being as much on the premises demised as the nature of the thing will admit of.

TROVER for two barges named Spring and Autumn, which had been taken under a distress for rent by the defendant, who was the receiver appointed by the Court of Chancery, of the profits of the estate of the party under whom the

bankrupts held Davis's Wharf, in Lower Thames Street.

The barges, at the time when they were taken, were lying in the river, underneath the wharf, and fastened by *ropes to piles driven down close by the side of the brick-work, partly for the support or protection of a granary which was on the wharf, and partly for the purpose of having barges attached to them. There was no space between the edge of the water and the granary, so that a person might step out of the building at once into the barges.

Vaughan, Serjt., for the plaintiffs, contended, that the barges ought not to

have been taken, as they could not be said to be on the premises.

BEST, C. J. I shall tell the Jury, that if the piles are constantly used, they form a part of the demised premises. The liberty of attaching barges to them is one of the conveniences and advantages of the wharf.

The lease granted to the bankrupts was then read. It described the property as a wharf ground and premises next to the river *Thames*, and a brick built warehouse, and contained the words "together with all easements, profits, commodities." &c.

commodities," &c.

BEST, C. J. If there had been nothing in the deed but the word wharf, I should have thought that description sufficient; for the barges were as much

attached as the nature of the thing would admit.

Vaughan, Serjt. The river is a public river, and the party has no interest in the soil.

BEST, C. J. That makes no difference. As the piles are fastened to the building partly for its support and partly for the purpose of attaching barges to

them, the barges must be taken as being on the demised premises.

Vaughan, Serjt., then endeavored to establish a case of fraudulent preference. He called the bankrupt's clerk, who proved that he saw the barges in the stream, about *the middle of the day before the distress. That the barges were not wanted for the purpose of being used in the business on the day of the distress, and that he did not remember their being brought alongside the wharf on any occasion before, when they were not wanted. He added, that he could not swear that either of the barges had been used for a week before the distress.

It was also proved, by the examination, under the commission, of one of the defendants, who was the broker, that on the evening before he told one of the bankrupts that he should come down the next morning and distrain, upon which the bankrupt said that he knew that rent was due, and expected a distress.

BEST, C. J. You see the difficulties which you have in this case. You will be met by proof that the barges were legally distrained.

Vaughan, Serjt. But fraud may always be inferred from circumstances. BEST, C. J. Do you think you can persuade a Jury to infer it from such circumstances as these? Why don't you call the bankrupt?

Vaughan, Serjt. He has not received his certificate.

BEST, C. J. You can call him if the other side do not object.

Wilde, Serjt. This action is defended under an order of the Court of

Chancery; and I would appeal to your Lordship to know, whether I have

authority, in such a case, to waive any objection.

BEST, C. J. I should think the Court of Chancery would be the first to wish all the facts to be discovered. I cannot give advice on the subject; but I will say to the *Court of Chancery, that it was my opinion that the *544] will say would bankrupt ought to be called.

Wilde, Serjt. We do not take by this delivery of the bankrupts, but by the

act of the law.

BEST, C. J., to Vaughan, Serjt. This is a most singular case; but I think you must first show that the barges were brought within the ambit of the premises by fraud, and when you have done that, I will give you my opinion upon the law.

A witness was then called for the purpose of making out that fact, but not

being able to do so, the plaintiffs were

Nonsuited.

Vaughan, Serjt., for the plaintiff. Wilde, and Adams, Serjts., for the defendants.

[Attornies—Van Sandau & T., and King.]

In the ensuing Term the Court granted a rule nisi for a new trial, which was afterwards discharged.

SMITH v. SPARROW et al.

A broker having a general authority to purchase spices for one person, having purchased some for that person on a Saturday, went to another person on the Sunday and offered them to him for sale, saying that he would deliver the contract on the Monday. The person to whom they were offered said, that he must have the contract on that day (the Sunday.) A bought note was accordingly delivered to him on the Sunday. The broker could not say when he made out a sold note for the vendor; whether it was within a week or more from the Sunday; but stated that he informed him of the sale on the Monday or Tuesday. The entry in the broker's book was not signed: Held, 1st. That the contract was not sufficient under the statute of frauds; and secondly, That suppossing it were so, yet that it would be vaid on account of its heaving hear made on a posing it were so, yet that it would be void on account of its having been made on a Sunday.

Assumpsit on a contract for the purchase of a quantity of nutmegs.

For the plaintiff, James Smith was called, who was his brother, and carried on business as a broker in the firm of *Smith & Williams. From his evidence it appeared, that the plaintiff, who lived at Chigwell, and had retired from business, generally had funds in the hands of Smith & Williams, and gave them a general authority to purchase spice for him. That on Saturday, the 26th of February, 1825, they purchased for him a quantity of nutmegs, of a broker named Albrecht. That Smith & Williams also did business for the defendants F. & R. Sparrow, who were tea dealers and grocers. That on the morning of Sunday, the 27th, James Smith, the witness, whose residence was at Stockwell, near to F. Sparrow's, called upon him and asked him if he would like to do any thing in spices, and mentioned to him the nutmegs he had bought on the Saturday, and offered them at 11s. 6d. a pound.

Sparrow said he would take them at 11s. 3d Smith said that he could not give an answer till he had been to town, and added, that he would deliver the contract on the Monday, with that for some mace, which Sparrow had ordered. Sparrow said he must have the contract that day, as he was going down to the country to get somebody to join him in the purchase. Smith went to town, and when he returned to Stockwell delivered a contract to Sparrow for the nutmegs, at 11s. 3d. It was then read. It was dated the 26th of February, 1825, and signed Smith & Williams, and commenced as follows:-"Messrs. F. & R. Sparrow. We have this day purchased for you, &c."

There was a note on the face of it in Sparrow's handwriting, "to sell at 12s. 6d." After the contract was delivered, Sparrow said that he would not have the nutmegs sold under 12s. 6d. a pound. The same day he gave Smith directions to buy more, and left him his address at Bristol, where he was

going."

The entry of the contract in the broker's book was read. It was, "F. & R. Sparrow, bought of Thomas Smith, &c.," dated 26th of February. It was The whole of the entry was made on the Sunday, with the exception of the words *Thomas Smith*, which were written on the *Monday. Smith, the broker, said, that his brother left it to them to do the best they could for him, and that they sent him in a statement every year, with an account of interest. He also said, in answer to questions put by BEST, C. J., that he never told Sparrow that he was selling for his brother. That he could not say when he made out a sold note for his brother, whether it was within a week of the sale or not; but that he informed his brother of what had been done, (both of the purchase and the sale,) on the Monday or Tuesday. The sold note made out for the plaintiff was dated the 26th of February, and signed Smith & Williams.

BEST, C. J., observed, It is material to know when this note was made out; because the question is, whether there must not be two parties to a

contract.

Wilde, Serjt. Under the statute of frauds it is enough that the party to be charged should sign. He cited Sanderson v. Jackson.

BEST, C. J. Still it is a question whether both must not be bound to make a contract.

Albrecht, the broker, who sold to Smith & Williams, was then called, and stated that he never heard of Thomas Smith as the buyer till several days after the prompt, when Spurrow made a difficulty about the contract; and that he told Smith (the witness) that he did not wish to know the principal, as he looked to him.

Vaughan, Serjt., contended that the broker was within *the law against carrying on business on a Sunday. He cited Fennel v. Ridler.

Wilde, Serjt., contra, cited Drury v. De Fontaine; and Bloxsome v. Williams.

† 2 B. & P. 238. The point there decided is as follows:—"A bill of parcels, in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within the statute of frauds; at all events, a subsequent letter, written and signed by the vendor, referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute.

the statute."

18 Dow. & Ry. 204. The point decided in that case is, that the statute 29 Car. 2. c. 7, for the better observation of the Lord's Day, is not confined to the carrying on of business publicly; and therefore, that a borse dealer cannot maintain an action upon a private contract for the sale and warranty of a horse, if made on a Sunday.

§ 1 Taunt. 131. "A sale of goods, made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor or his agent, is not void at common law, or by the stat. 29 Car. 2. c. 7."

the stat. 29 Car. 2, c. 7."

the stat. 29 Car. 2, c. 7."

Where a parol contract was entered into for the purchase of a horse above the value of 101. on a Sunday, with a warranty of soundness, and the horse was not delivered and paid for until the Tuesday following:—Held, 1st, that the contract was not complete until the latter day; and secondly, that supposing it to be void within

BEST, C. J. There are different decisions upon that point. I think the question has been decided too narrowly. I should have considered that if two parties act so indecently as to carry on their business on a Sunday, if there had been no statute on the subject, neither could recover. Upon this point, therefore, I will give you leave to move to enter a nonsuit, if the verdict should be for the plaintiff. But there is another point: I think there is no contract here; and upon this point I should wish to hear my brother Wilde.

Wilde, Serjt. There was a general authority to buy, and a parol bargain has been proved. The statute leaves the parol contract binding as far as the party not sought to be charged is concerned. The paper put in contains all the requisites of a contract, being signed on the part of *the party to be charged. No doubt, there must be mutuality; but as to one it may be evidenced by parol, though as to the other it must be in writing. It is the constant course, where a letter is produced to prove a contract, not to require proof of any signature on the part of the seller, but only as far as he is concerned to show a parol bargain made by competent authority.

cerned to show a parol bargain made by competent authority.

Spankie, Serjt., on the same side. There has been a ratification of the contract made, and that gets rid of the objection altogether; and Thomas Smith was clearly chargeable by having given the authority to his broker to

buy and sell for him.

BEST, C. J. I am of opinion that the plaintiff must be called. I remember the words of the statute of frauds, and allow that, generally speaking, no other evidence is required than a writing signed by the party to be charged. But in this case no paper was signed by the agent of the plaintiff; and if he had refused to fulfil his part of the contract the defendant could not have maintained any action against him. To render a contract valid there must be mutuality; both sides should be bound. Now the contract in this case is not binding on both sides. I ought not to doubt, because I am satisfied that when this law is properly understood many of the evils resulting from the employment of brokers will be remedied. Brokers are in general a most respectable set of men; but I know that brokers have been entrusted with powers which I for for one will not consent that they shall have. If a broker is bound to put both names at once, then no fraud can be practised; but if he is to be at liberty to put down my name one day and the other party's another, then it may give rise to many and serious mischiefs; and I hope I shall do some good if my present opinion should be confirmed by the Court. The Courts now require that every thing moving to the consideration should be stated in the contract; and *what is the consideration here? Why it is this: I make a contract with A. B., because A. B. makes a contract with me; and both these contracts ought to be in writing. For these reasons I am of opinion that the plaintiff ought to be called.

Nonsuit.

Wilde, and Spankie, Serjts., and D. Pollock, for the plaintiff. Vaughan, and Adams, Serjts., and Thesiger, for the defendants.

[Attornies—Rixon, and D. Willoughby.]

On the second day of the ensuing Hilary Term, Wilde, Serjt., moved for a new trial on the two points of the sufficiency of the contract, and the effect of

the 29 Car. 2, c. 7, still it was not an available objection on the part of the vendor, in an action for the breach of the warranty, the vendee being ignorant of the fact, that the former was exercising his ordinary calling on the Sabbath-day."

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the statute 29 Car. 2. On the first point, in addition to the cases cited at the trial, he mentioned Allen v. Benet, Schneider v. Norris, and a case in 9

The Court granted a rule to show cause, which came on to be argued in the

course of the same Term.

*The Court were of opinion that the decision at Nisi Prius was [*550 right upon both the points, and therefore they discharged the rule.

† 3 Taunt. 169. "An order for goods, written and signed by the seller, in a book of the buyer, but not naming the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller claiming the performance of the order to constitute a complete contract within the statute of frauds. It is no objection to the validity of a contract for the sale of goods, signed by the seller, that the seller cannot enforce the same contract for the sainst the buyer, because the buyer has never signed it."

12 M. & S. 286. "A bill of parcels, in which the name of the vendor is printed, and that of the vendes written by the vendor, is a sufficient memorandum of the contract within the statute of frauds, to charge the vendor.

GOLDSTONE et al. v. OSBORN, Bart., et al.

One of the conditions in a policy of insurance against fire, stated that if any difference should arise on any claim, it should be immediately submitted to arbitration, and after directing how the arbitrators should be chosen, added, that no compensation should be payable until after an award determining the amount thereof should be duly made.—It was held, that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover any thing, and did not merely question the amount of damage.

Assumest on a policy of insurance, against three of the directors of the County Fire Office. The declaration stated an insurance by the plaintiffs on the 24th of June, 1826, and set out various conditions, one of which was, that if there appeared any false swearing, or attempt at fraud, by the claimant, he should forfeit all claim to restitution or payment by virtue of the policy. It then averred, that on the 27th of July, 1826, the articles and things mentioned in the policy, were accidentally burnt and destroyed by fire, whereby the plaintiffs sustained a loss to the amount of 9361. 6s. 3d. There were the usual money counts, and the plea was the general issue.

One of the conditions on the policy was, that if any difference should arise on any claim, it should be immediately submitted to arbitration, and such arbitration should be made by one or two persons to be indifferently chosen by the assured, or his legal representative, and by the office, or by such third person as the said arbitrators should appoint, or by any two of them, and no compensation should be payable until after an award determining the amount thereof should be duly made, and the said reference should be subject to such rules and conditions as are usually inserted in orders of reference in the Court of King's Bench, at Nisi Prius, in the City of London, and the submission should be made a rule of Court.

Wilde, Serjt., for the defendants, said, that after the account was delivered in, there was some demur; the *plaintiffs proposed to refer, and the defendants consented. But the plaintiffs then refused to refer any thing but the amount. Cases have been determined, upon general clauses of arbitration; but this is not a general clause, and there is no case which applies to it. It is a condition precedent to the right of recovering, that the amount should be ascertained by previous reference.

A letter from the plaintiff's attorney, to the directors of the office, dated 30th August, 1826, was read, offering to refer the plaintiffs' claim to arbitration. To this an answer was sent by the solicitor to the directors, dated the 15th of September, 1826, agreeing to a reference, and suggesting the nomination of six barristers, three by each party, and the selection of an arbitrator out of that number, by ballot. On the 23d of September, the plaintiffs' attorney wrote in reply, that he thought the condition only required a reference as to amount, and did not apply to a case where an objection was made to the right to recover altogether. He added, that the best way would be, to refer under a judge's order, in an action to be commenced. In pursuance of this, he sent a copy of a writ with the form of an agreement of reference.

Vaughan, Serjt., for the plaintiffs, upon this submitted, that their attorney's construction of the condition was right, and that they had proposed to do all

that was required of them. He cited Kill v. Hollester.†

BEST, C. J., thought, that, consistently with the decisions, the action was

maintainable, and allowed the plaintiffs to proceed.

*There was another condition which required that all persons insured, sustaining any loss or damage, should forthwith give notice to the head office, and as soon as could be, furnish as perfect an account as they were able, and verify it by oath, or affirmation, and also obtain a certificate under the hands of some reputable householders of the parish, to the satisfaction of the Association, that they were acquainted with the character and circumstances of the parties claiming, and did know or verily believe, that they really, and by misfortune, without any kind of fraud, had sustained by the fire a loss to the amount mentioned in such certificate. And it was provided that until such affidavit and certificate should be produced, the money should not be payable.

For the purpose of showing a compliance with this condition, a certificate

was put in, commencing as follows:-

"Messrs. Noah Goldstone and Caspar Marks having shown us their account of the loss sustained by them from the fire at their premises in Old Street, viz., on their household furniture, &c., we do verily believe, &c."

Several of the persons who had signed the certificate, were called and examined as witnesses, and on their cross-examination they said, that they had not been shown any account of the loss beyond the statement of it in the certificate itself.

BEST, C. J., upon this observed,—I think I should be well warranted in directing the plaintiff to be called, but I think it will be better for the interests

of the public that the case should be allowed to go on.

*A great number of witnesses were called to give evidence of the cause of the fire, the nature of the stock on the premises, and the conduct of

the plaintiffs; and

BEST, C. J., left it to the Jury to say, First, Whether the fire was accidental; and Secondly, if it was, whether the plaintiffs had been guilty of, or attempted any fraud.

The Jury were of opinion that there was fraud, and found a verdict for the defendants.

Vaughan, and Taddy, Serjts., and E. Lawes, for the plaintiffs. Wilde, and Spankie, Serjts., and C. Law, for the defendants.

[Attornies—C. Wright, and Nethersole & B.]

† 1 Wils. 129, B. R., E. 19 G. 2, 1746. An action on a policy of insurance, containing a clause that in case of any loss or dispute about the policy, it should be referred to arbitration. The declaration contained an averment that there had not been any reference. It was objected at the trisl, that the action did not lie before a reference. The point was reserved, and the Court said, "If there had been a reference depending or made and determined, it might have been a bar, but the agreement of the parties cannot oust this Court; and as no reference has been made, nor is any depending, the action is well brought, and the plaintiff must have judgment."

DANIEL v. BOWLES.

In an action by a lady for a breach of promise of marriage, it is not necessary, for the par pose of making out the mutual promises, which are necessary to support the action, that the plaintiff by words consented to accept the defendant; but the Jury may infer such consent from the circumstances of her making no objection at the time of the offer, and her afterwards receiving visits from the defendant in the capacity of a suitor.

Breach of promise of marriage. The mother of the plaintiff proved, that on the 20th of February the defendant was introduced to her at Pisa; and on the 26th of that month he said that he was very much in love with her daughter (the plaintiff.) The mother said, that she would mention the subject to her husband, which she accordingly did; and a few days afterwards an interview took place in the drawing-room between herself, the plaintiff, and the defendant. The defendant introduced the subject, and said, that he hoped that there was no objection on the part of the young lady's parents. The witness replied, that there was none; upon which he took her hand, *and said to her, from this time consider me as your son." It did not appear that the plaintiff made any observation. The witness then said, that as the family were Catholics, she should wish the marriage to take place according to the Catholic ritual. The defendant said he had no objection; and he continued his visits in the capacity of a suitor till the month of April, when he eloped with the plaintiff; and they came together to England. The defendant had a wife living at the time.

Vaughan, Serjt., submitted, that there was not sufficient evidence of a promise to support the action: there ought to be mutual promises; and there was no proof of any promise by the plaintiff, which would enable the defendant to

maintain an action against her.

BEST, C. J. I think that her being present, and not making any objection, coupled with what happened afterwards, shows that she consented, and would be sufficient to enable the defendant to maintain an action against her It would be indelicate to expect that she should consent in words. No doubt the Jury must be satisfied that there were mutual promises; but I think there is evidence from which they may be inferred,

Verdict for the plaintiff—Damages, 1500l.

Wilde, Serjt., and Merewether, for the plaintiff. Vaughan, Serjt., and C. Phillips, for the defendant.

[Attornies—Derby, and Garred.]

See the note to the case of Irving v. Greenwood, Vol. 1, p. 351, of these Reports.

*GOODSON v. GOULDSMITH.

A. makes an agreement with B. for the sale of premises, at the time in the possession of t. makes an agreement with B. for the sale of premises, at the time in the possession of C, under an agreement for four years, (three of which have expired.) and undertakes to B. that he will do such repairs as are left undone by C. at the expiration of his (C.'s) tenancy. B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair.—Semble, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy, as created by the agreement between A. and C.

If the declaration in an action by B. against A. aver that C. did not leave the premises in good repair at the expiration of his tenancy, the agreement between A. and C. need not be produced to prove such averment.

THE declaration stated, that the defendant sold to the plaintiff certain premises, which were held by one Felicia Le Blanc, under an agreement with the defendant, dated in June, 1824, for four years, and by which the said Felicia Le Blanc was bound, among other things, to leave the said premises in good tenant-like order and condition, and that the defendant argeed to do all such other tenantable repairs as should not be done by the said Felicia Le Blanc. It then averred that the said Felicia Le Blanc did not leave the premises in the said agreement mentioned, at the expiration of her tenancy, in good tenant-like order and condition, but neglected, &c., in consequence of which the defendant was called upon to repair them, and refused, &c. Plea-The general issue.

Three years of Mrs. Le Blanc's tenancy had expired at the time when the plaintiff purchased of the defendant; and the plaintiff immediately made an agreement with her to quit before the expiration of the four years. She did so quit, leaving the premises out of repair; and the plaintiff, by this action, called upon the defendant to put them into a proper state, he having bound himself, by his agreement with the plaintiff, that he would, at the expiration of Mrs. Le Blanc's tenancy, do such repairs as should not have been done by her. agreement between the defendant and Mrs. Le Blanc was not produced.

Bosanguet, Serjt., and Rotch, for the defendant, argued, that it ought to be put in, in order to show when Mrs. Le Blanc's tenancy expired, and thereby to prove the allegation in the declaration. They also contended, that the defendent had not agreed, and therefore could not be called upon, to perform the

repairs earlier than at the expiration of the four years.

BEST, C. J., was of opinion, that evidence of the time *when Mrs. Le Blanc actually left the premises, was sufficient, without the production of the agreement, because the plaintiff was no party to the agreement. His Lordship also thought, that the words in the declaration, "at the expiration of her tenancy," might be rejected as surplusage; and it was immaterial when Mrs. Le Blanc quitted, because at that time, whenever it was, the defendant might have entered to make the repairs.

The case was afterwards referred.

Vaughan, Serjt., and Parke, for the plaintiff. Bosanquet, Serjt., and Rotch, for the defendant.

[Attornies - Baxendale & Co., and Brown.]

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COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER HILARY TERM, 1827.

BEFORE LORD CHIEF JUSTICE ABBOTT.

RAGGETT v. MUSGRAVE, Bart.

If the rules of a club be contained in a book kept by the master of the club, and accessible to the members, every member of the club must be taken to be acquainted with them.

Assumpsit by the plaintiff, as master of the Cocoa-tree Club, against the defendant as one of its members, to recover 10l. 10s., the amount of the defend-

ant's subscription for the year 1825.

It was proved that the defendant had been a member of the club, and that all the members on their admission agreed to conform to the rules. The rules were put in. By the 1st of them, the club was to consist of three hundred members, at an annual subscription of ten guineas each. By the 8th, every member intending to withdraw from the club, was to signify his intention in writing to the *master, and pay his subscription for the current year; and by the 18th, the plaintiff was appointed master of the club. It appeared that the whole of the rules of the club were contained in a book kept by the master, which was accessible to all the members, but that the rules were neither posted up nor sent to the members.

Scarlett, for the defendant, objected, that there was no proof that the defend-

ant knew of these rules.

ABBOTT, C. J. I am of opinion, that every member of a club must be presumed to be acquainted with its rules.

Verdict for the plaintiff—Damages, 101. 10s.

Gurney, and Chitty, for the plaintiff. Scarlett, and Thesiger, for the defendant.

[Attornies—Fisher & S., and Arnott & M.]

See the case of Raggett v. Bishop, ante, p. 343.

TRUWHITT v. DEPREE.

If certain commissioners under a private act of Parliament may sue and be sued by their clerk, it is not necessary, at the trial of an action brought in the name of the clerk, to prove that he sues by their authority.

DEET by the plaintiff as clerk to the commissioners for paving the Savey precinct, againt the defendant, for the amount of a paving rate due from him as occupier of a house and stables.

By a private act of Parliament, 57 Geo. 3, c. 29, the commissioners are empowered to cause actions to be brought for the recovery of paving rates; and

they may, under that act, sue and be sued by their clerk.

The appointment of the plaintiff as their clerk was proved by the production of the commissioners' minute book, which contained his appointment; and it was also proved that the rate was duly made; and that the defendant occupied the property in question.

Marryat, for the defendant, submitted, that it should be proved that the plaintiff had the sanction of the commissioners to commence the present action.

*Abborr, C. J. Can I take it that the clerk of the commissioners has brought this action without their authority? If he had done so, the defendant could have stayed the proceedings.

Verdict for the plaintiff.

Scarlett, and Platt, for the plaintiff. Marryat, for the defendant.

[Attornies—Truwhitt, and Noy & Co.]

See the case of Doe d. Clark and Others v. Spencer, ante, p. 79.

PAINE v. PRITCHARD.

In trover for a bill of exchange, the Jury may, if they think fit, include the amount of the interest in the damages, and this although there is no mention of interest in the declaration, and no special damage laid.

TROVER for a bill of exchange for 100l. It appeared that the bill came into the possession of the defendant in the year 1822, and that it belonged to the plaintiff.

Abborr, C. J., had directed a verdict for the plaintiff. Scarlett, for the plaintiff, asked for interest on the bill.

Abbott, C. J. As a matter of law, I think you are entitled to interest.

Gurney, for the defendant. There is nothing in the declaration about interest; and no special damage is alleged; so that, even if a plaintiff could entitle himself to interest under any form of declaring, I submit that he cannot recover it on this form of declaration.

ABBOTT, C. J. I think that the plaintiff is entitled to interest, if the Jury choose to give it; and I shall leave it to them to say, whether they will give

interest or not.

Verdict for the plaintiff—Damages, 1151., being the amount of the bill and three years' interest.

*Scarlett, and Chitty, for the plaintiff.

Gurney, and F. Pollock, for the defendant.

[Attornies-J. Hunt, and Virgo.]

EDIS v. BURY.

If it be ambiguous whether an instrument be a bill of exchange or a promissory note, the person who receives it may treat it as either. An instrument which is in the form of a note, but which is in addition addressed to a third party, who accepts it, is a promissory note.

Assumestr for goods sold. The only question of law in this case was, whether the following instrument was a bill of exchange, or a promissory note. It was in these words:—

"5th August, 1826.

4£44: 11: 5.

"Three months after date, I promise to pay to Mr. Edis 441. 11s. 5d. for value received.

"J. Bury.

"To Mr. J. B. Gautherd, 85, Montague Place, Bedford Square."

It was accepted by Gautherd, and indorsed by the defendant.

Brougham, for the plaintiff. I submit that this paper is clearly not a bill of exchange, but a promissory note; and if it were even doubtful, we have a right to treat it as a promissory note as against this defendant, who has himself made it one; and his having added the name of an acceptor cannot alter the nature of the instrument. Our remedy is not taken away against the maker of the note, because we may also have a remedy against the person who may have put his name on it as acceptor.

Campbell, for the defendant. The plaintiff is bound by his own election in taking this instrument as a bill of exchange, and treating it as such. He takes it, directed to a third person, accepted by that third person, and indorsed by the defendant. It is presented by the plaintiff when due, and notice is given of the dishonor to the drawer; and the plaintiff cannot therefore now treat it as a *promissory note for the first time, but must be bound by

his own option.

He then called a clerk of the plaintiff's bankers, who proved that they presented the paper, as a bill for payment, when due, and gave notice of the dishonor to the defendant as drawer.

Brougham, in reply. The apprehension of the plaintiff can make no manner of difference in the case. It cannot alter the structure of the instrument. We are therefore entitled to a verdict for the amount.

ABBOTT, C. J. As at present advised, I am clearly of opinion that this is a promissory note: that is my strong opinion: but I will reserve the point for the defendant.

Verdict for the plaintiff.

Brougham, and Pattison, for the plaintiff. Campbell, and F. Pollock, for the defendant.

[Attornies-Elgie, and Nicholson.]

In the ensuing Term, Campbell moved for a rule to show cause why a nonsuit should not be entered, on the ground that the instrument in question was a bill of exchange, and not a promissory note. But the Court held, that if it were equivocal, whether the instrument were a bill of exchange or a promissory note, the party receiving it might treat it as either; but their Lordships considered this instrument to be a promissory note.

Rule refused.

Mr. Justice Bayley lays down, (Bills of Exchange, p. 4,) that no particular words are necessary to make a bill or note; any order or promise, which, from the time of making it, cannot be complied with or performed without the payment of money, is a bill or note. Thus an order or promise to deliver, or that J. S. shall receive money, or to be account-

able or responsible for it to him, or order, is a good bill or note: but a mere acknowledgable or responsible for it to him, or order, is a good bill or note.

In the case of Chadwick v. Allen, 1 Str. 706, the plaintiff declared on the following instrument as a promissory note—"I do acknowledge that Sir Anthony Chadwick has delivered me all the bonds and notes, for which 400l. were paid him on account of Colonel Synge; and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10l., which 10l. and 15l. 5s. belance due to Sir Andrew I am still indebted, and do promise to pay."

There was a demurrer to the declaration, and indepment for the plaintiff.

which 10t. and 15t. 5s. balance due to Sir Andrews I am still indebted, and do promise to pay." There was a demurrer to the declaration, and judgment for the plaintiff. In the case of Morris v. Lee, 2 Ld. Ray. 1396; 1 Str. 609, and 8 Mod. 326, a note, whereby the defendant promised "to be accountable to A., or order," was held to be rightly declared on as a promissory note, by the plaintiff, who was the indorsee; and the Court said, that "there are no precise words necessary to be used in a promissory note or bill of exchange. Deliver such a sum of money, makes a good bill of exchange."

In the case of Shuttleworth v. Stephens, 1 Camp. 407, the following was declared on as hill of exchange.

a bill of exchange:

"21st October, 1804. "Two months after date, pay to the order of John Jenkins, 781. 11s. value received. "Thomas Stephens. "At Messrs. John Morson & Co."

Lord Ellenborough held, that this was properly declared on as a bill of exchange, although

Perhaps it might have been treated as a promissory note, at the option of the holder.

And in the case of Allan v. Mausen, 4 Camp. 115, Gibbs, C. J., held an instrument in the same form to be rightly declared on as a bill; but in that case the Jury found that the word "at" had been written very small, with intent to deceive any person who might take the instrument.

In the case of Green v. Davis, 6 Dow. & Ry. 306, the following was held to be a promissory note :-

"Received of Mr. Boas, 1001., which I promise to pay with lawful interest. "J. Davis."

And the Court were of opinion, that as it bore a 3d. receipt stamp and a 1l. agreement stamp, it was not admissible in evidence, for want of a proper note stamp.

With respect to I. O. U.'s, it was held in the case of Fisher v. Leslie, 1 Esp. N. P. C. 225, that a slip of paper having on it, "I. O. U. eight guineas," was a mere acknowledged. ment of a debt, and not a promissory note or a receipt, and therefore admissible in evi-

dence without a stamp.
In the case of Israel v. Israel, 1 Camp. 499, Lord Ellenborongh received the following in

evidence as an acknowledgment of a debt, without being stamped.

"I owe my father 470l.

James Israel."

But in the case of Gray v. Harris, 1 Camp. 501 n., Lord Eldon, C. J., is said to have held that an I. O. U. could not be received in evidence without a stamp, being a promis
*562] sory note. However, in the case of Childers v. Bulnois, Dow. *& Ry. N. P. C. 8, which was an action for money lent, the plaintiff put in two slips of paper, signed by the defendant in the following terms:—"I. O. U. 4001." and "I. O. U. 2501." but neither of them had any stamp, date of time, or place of address. The plaintiff also called a witness, who proved, that the plaintiff and defendant met in the street, when the former said to the latter, "I must have some money to-day;" to which he replied, "you cannot have any to-day, but you shall have 2001, to-morrow, and a bill for the rest, which you may get discounted;" it was objected, that the papers required to be stamped, and that the conversation did not show a specific claim on the part of the plaintiff, or a specific that the conversation did not show a specific claim on the part of the plaintiff, or a specific acknowledgment on the part of the defendant. But Abbott, C. J., was of opinion, that he was bound to receive both the written and parol evidence produced, but left it to the Jury te say, whether, even combined, they were sufficient to convince them that the plaintiff was really entitled to the sum which he sought to recover from the defendant in this action; and the Jury found for the defendant.

RAIKES v. RICHARDS.

Beidence.—In an action on the case for a libel in a newspaper. The plaintiff cannot give evidence of the contents of a placard posted in the window of a third person, although the placard states what will appear in the defendant's newspaper respecting the plaintiff, and that which it foretold does appear accordingly.

Case for several libels. Plea—General issue. The libels declared on were published in a newspaper called the Age, of which the defendant was the registered proprietor.

A witness stated that at a shop in Bond Street, he had seen placards announcing what the Age newspaper of the ensuing Sunday would contain;

and that those placards mentioned the name of Mr. Raikes.

Brougham, for the defendant. I submit that this placard is not evidence against the defendant. It is only proving that other persons have printed the

plaintiff's name, and stuck it up.

Scarlett, contra. The placard announces that something relating to Mr. Raikes will appear in the next Sunday's Age; and we shall prove that it did appear. It is therefore evidence against Mr. Richards, because the placard foretells what he is going to do, and he afterwards does it. It is therefore reasonable evidence that he was the author of the placard.

ABBOTT, C. J. I think this is too remote: a person riding or walking down Bond Street sees a placard, and there is no evidence to show, that it was published by the defendant. The persons at the shop might have been called to show that they had received the placards from the defendants, but that is not done. I think the evidence does not sufficiently connect him with the publication of them.

Verdict for the plaintiff—Damages, 40s. Scarlett, Denman, C. S., and Adolphus, for the plaintiff.

Brougham, for the defendant.

[Attornies—Capron & Co., and Harmer.]

REX v. CHARLES EDMUND GRINDALL.

If an indictment for perjury charge that the defendant falsely swore to certain facts, and the deposition appear to be joint, and that his wife first deposes to the facts, and then the defendant swear that he is sure that A. B. is one of the persons who assaulted, &c. This is no variance, as it is sufficient for the indictment to state the substance of what the defendant swore.

Perjury. The indictment stated, that upon a certain information upon osth, intituled, "The information and complaint [it here set out the title of the information] the defendant falsely, maliciously, wilfully and corruptly, did swear, say, and depose in substance, and to the effect following, that is to say: 'the defendant, (meaning the said Charles Gardner,) I (meaning the said C. E. Grindall) am certain is one of the persons that assaulted and otherwise illtreated my wife, (meaning one Jane Grindall,) on the 17th day of September, &c.' [following the words of the deposition to the end] whereas in truth, &c., C. Gardner did not assault," &c. The information on which the perjury was assigned, was taken on oath before H. M. Dyer, Esq., on a charge of assault preferred by

Mrs. Grindall against Charles Gardner. The information was in the following terms:

***Middlesex to wit:—The information and complaint of Jane, the wife of Charles Edmund Grindall, of, &c. And of the said Charles Edmund Grindall, made on oath on the 22d of November, in the year 1826, before me, Henry Morton Dyer, Esq., one of his Majesty's Justices of the peace, &c., upon the examination, and in the presence and hearing of Charles Gardner, then and there charged with an assault. And first the said Jane Grindall for herself saith, that the defendant is one of the persons who assisted W. J. Stinton and others, in handcuffing and otherwise assaulting me, on, &c.

(Signed) Jane Grindall.

"And the said Charles Edmund Grindall sworn, says, the defendant, I am sure, is one of the persons that assaulted and illtreated my wife, on the 17th day of September last, at No. 19 Judd Place, Somers Town; between the hours of seven and nine o'clock in the evening.

Sworn before me, }

H. M. Dyer. }

(Signed) C. E. Grindall."

Brougham, for the defendant. I submit that there is a fatal variance between the indictment and the information. The indictment sets forth the deposition as sworn by the defendant alone. The information read in support of this, sets forth the oath of Mrs. Grindall, and then goes on, as a continuation, and says, that the defendant stated so and so. Now it is very different to say that one swore that a man committed an assault on A. B., and to say that A. B. swore so and so, and that A. B. having done so, the defendants afterwards swore it.

ABBOTT, C. J. That is matter of observation.

Brougham. I submit it to your Lordship as matter of variance.

ABBOTT, C. J. I think that what the defendant swore is set out in substance, which is enough.

*The defendant was acquitted, the Jury considering that he

was mistaken in the person of Charles Gardner.

Adolphus, for the prosecution.

Brougham, and Chitty, for the defendant.

[Attornies—Gattie & Co., and Sweet & Co.]

COWLES v. DUNBAR and CALLOW.

If a reasonable charge of felony be made against a person, who is given in charge to a constable, the constable is bound to take him, and will be justified in so doing, although the charge may turn out to be unfounded. If a person be taken by a private individual without warrant, on suspicion of felony, and will not tell his name, and otherwise conducts himself, so as to excite suspicion; this only goes in mitigation of damages, if turn out that no felony was committed. The statute 3 Geo. 4, c. 55, s. 21, which relates to the apprehension of reputed thieves without warrant, only extends to persons generally reputed to be thieves, and not to persons suspected of a particular theft.

FALSE imprisonment. The defendant *Dunbar* pleaded, first, the general issue; and second, a justification, that his house had been robbed, and that in consequence he kept a look out; and that seeing the plaintiff, in a suspicious manner, and under suspicious circumstances, carrying a chest of drawers

which the defendant Dunbar believed to be those which had been stolen from his house, and vehemently suspecting, &c., he took the plaintiff to a watchhouse till he had inquired; and that finding that no sufficient proof could be obtained, he caused the plaintiff to be discharged. Replication, de injuria. The defendant Callow, who was a constable, pleaded the general issue.

It appeared that a house belonging to Mr. Dunbar, and situate in Patriot Square, had been robbed of a great variety of articles, about a week before the imprisonment in question. And that Mr. Dumbar kept watch at another house, to see if any further robbery should be committed; and that at about six o'clock, in the morning of the 26th of *March, 1826, seeing the plaintiff carrying a chest of drawers, which he suspected to be his, in a direction in which he would have come if he had brought them from his house, went up to the plaintiff, and asked him who he was; that the plaintiff stated himself to be a laborer in the London Docks, but refused to tell his name, (however, as to this there was some contradiction,) whereupon Mr. Dunbar threatened to send him to the watch-house; that, on this, the plaintiff set down the drawers and ran away; whereupon Mr. Dunbar presented a pistol at him, and pursued him, and having overtaken him, delivered him into the custody of the other defendant, who was a constable. It further appeared, that the defendants made some inquiries, and then discharged the plaintiff, without taking him to any magistrate.

Scarlett, for the defendant Dumbar. I submit that if a person so acts as to place himself in the reasonable suspicion of having committed a felony, such person may be legally taken into custody: but even if your Lordship holds, that in general if you take a man without warrant, you will be only justified in case the man so taken was guilty; yet, by the statute 3 Geo. 4, c. 55, s. 21,‡ it is *enacted, that any person may apprehend suspected persons and reputed thieves. Now you cannot tell that a man is a reputed thief, except by his conduct. If you find him under suspicious circumstances, as, if a robbery has been committed, and a man is seen carrying away goods, who, when called to, will not stop, but tries to escape, and will give no account of himself. I submit that these are ample grounds for detaining him.

ABBOTT, C. J. This act is not intended for cases of this kind, but it is intended to apply to persons generally reputed to be thieves. Taking the preamble, which is referred to by the words "such suspected person," it appears

clearly to apply to persons who are known to be reputed thieves.

† See ante, Vol. 1, p. 41, n. (a.) And in the case of M'Cloughan v. Clayton, Holt. N. P. C. 478, it was held, that in a case like the present, the constable might give the special matter in evidence under the general issue; but that a party giving another in charge to a constable, must plead specially.

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t By the 21st sec. of this statute, (which was passed for regulating the police of the metropolis.) after reciting that, 'Whereas ill-disposed and suspected persons, and reputed metropolis.) after reciting that, 'Whereas ill-disposed and suspected persons, and reputed thieves frequent the parks, fields, streets, highways and places adjacent, and divers places of public resort, and the avenues leading thereto, within the City of London and the liberties thereof, the limits of the weekly bills of mortality, and the said parishes of Saint Mary-le-bone, Paddington, Saint Pancras, Kensington, and Saint Luke, Chelsea, and also the said river Thames, and the docks and creeks, quays and warehouses adjacent thereto, and the streets, highways and avenues leading to the said river, docks. creeks, quays and warehouses, with intent to commit felony on the persons or property of his Majesty's subjects; and although their evil purposes are sufficiently manifest, the power of his Majesty's Justices of the peace to demand of them sureties for their good behaviour, hath not been of sufficient effect to prevent them from carrying their evil purposes into execution; it is enacted, "that it shall be lawful for any constable, headborough, patrol, watchman, or other person, to apprehend every such suspected person or reputed thief, and convey him or her before any Justice of the peace; and if it shall appear before the said Justice, upon the oath of one or more credible witness or witnesses, that such person is a persor of evil fame and a reputed thief, and such person shall not be able to give a satisfactory of evil fame and a reputed thief, and such person shall not be able to give a satisfactory account of himself or herself, and of his or her way of living, and it shall also appear to the satisfaction of the said Justice, that there is just ground to believe that such person was in or on such park, field, street, highway, river, dock, creek, quay, warehouse, avenue of other place as aforesaid, with such intent as aforesaid, every such person shall be deemed a rogue and vagabond, within the intent and meaning of an act made in the present session, for consolidating and amending the laws relating to rogues, vagabonds, and other die and disorderly persons."

Brougham, for the defendant Callow, contended, that when a person gives charge of another to a constable, the constable is bound to take him; and submitted that this defendant ought to be acquitted.

ABBOTT, C. J. A constable is obliged to act if there is a reasonable charge of felony; whether there was such here, is for the Jury to say. I doubt

whether I can direct an acquittal.

* Scarlett addressed the Jury for the defendant Dumbar, in mitigation

*568] of damages.

ABBOTT, C. J. (in summing up to the Jury.) The cases of the two defendants are very distinguishable from each other. Callow is a constable, and if a reasonable charge of felony is given, he is bound to take the party into custody; and if that were so here, he is entitled to your verdict. Mr. Dunbar, who gave charge of the plaintiff, was a person of some consequence in the neighborhood, and if Callow was acting fairly and honestly in the discharge of his duty, you will say he is not guilty. Mr. Dunber has pleaded a justification, which he has failed to make out, a verdict must therefore be found against The plaintiff refused to give an account of himself, and if a man be found under suspicious circumstances, and confirms the suspicion by refusing to give an account of himself, he cannot expect large damages, if he is illegally detained; but, as to this there is some contradiction; however, Mr. Dunbar appears to have acted upon a fair suspicion, and bona fide.†

Verdict for the plaintiff, against the defendant Dunbar-Damages. 1001.

Verdict for the defendant Callow.

*Gurney, and Archbold, for the plaintiff. ***569**] Scarlett, and Chitty, for the defendant Dunbar.

Brougham, for the defendant Callow.

[Attornies—Gray, Junr., and Young & Co.]

t If a felony be committed in fact, and A. suspects B. did it, and hath probable cause of suspicion, A. may arrest B. for it, and justify it in an action of false imprisonment. 1 Hale, P. C. 588. It was formerly considered, that even a constable could not justify detaining a party upon a charge given to him, if it turned out that no felony had been committed: but this was held otherwise as to constables in the case of Samuel v. Payne, Doug. 345; where it was decided that after a charge fairly given to him, a constable might justify detaining a man, although the Jury should be satisfied that no felony had been committed. And the same point was held by Buller, J., as to a charge of breach of the peace. 4 Camp. 421. In the case of Lawrence v. Hedger, 3 Taunt. 13, it was held, that watchmen and beadles are justified, at common law, in arresting persons found in the streets at night, with bundles, &c., under suspicious circumstances, although it may afterwards appear, that no felony had been committed. † If a felony be committed in fact, and A. suspects B. did it, and hath probable cause of no felony had been committed.

In the case of M Cloughan v. Clayton, Holt, N. P. C. 478, it was held by Bayley, J., that a constable taking a person into his enstody, on a charge of felony, given to him, might, on ascertaining the saspicion to be groundless, discharge him without going before a Justice.

See also the very able note of the learned reporter, appended to that case.

ADJOURNED SITTINGS IN LONDON, AFTER HILARY TERM, 1827.

FLETCHER et al., Assignees of BILLINGE, a Bankrupt, v. FROGGATT.

If the drawer of a bill for 2001, not having received due notice of its dishonor, say, that he does not mean to insist upon want of notice, but add, that he is only bound to pay 701.; the whole of his statement must be taken together, and the holder in an action against him can only recover to the amount of the 701.

Assumest on a bill of exchange for 2001., by indorsee against drawer. Sufficient notice of dishonor had not been given; but a witness was called, who stated, that in a conversation with the defendant about the bill in question, the defendant said, "I do not mean to insist upon want of notice; but I am only bound to pay you 701." Something was then to be done by some other person in the course of the day on which the conversation took place; and the defendant added, "I will call to-morrow morning, and see that all is arranged satisfactorily."

Hill, for the defendant, submitted, that at least this admission would only

entitle the plaintiffs to the sum mentioned in it.

Scarlett, for the plaintiffs, contended, that as it was a *waiver of the objection on the ground of want of notice, it would entitle the plaintiffs to recover the whole amount of the bill.

ABBOTT, C. J. The defendant does not say that he will pay the bill, but that he is only bound to pay 70!. I think the plaintiffs must be satisfied with the 70!.

Verdict for the plaintiffs, 70%

Scarlett, for the plaintiffs. Hill, for the defendants.

[Attornies-J. James, and Froggatt.] .

EAST v. CHAPMAN.

Semble, that in an action for a libel, evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special
pleas of justification which were on the record, have been withdrawn before the trial, and
the plaintiff in consequence is not prepared with evidence to answer the defendant's proof.
A witness, who has given evidence on his examination in chief, as to the truth of a libel,
may be asked on his cross-examination, whether the MS. of the libel was not written by
him, and he is bound to answer the question.

Action for a libel in the Sunday Times newspaper, purporting to be an account of certain proceedings which took place at a coroner's inquest. Plea—The general issue. There appeared upon the record several special pleas of justification; but they were struck through with a pen. Some of the pleas averred the truth of the facts, and some only stated that the circumstances mentioned in the libel did occur, as reported, before the coroner's inquest.

Scarlett, in stating the plaintiff's case, was reading the special pleas from

Denman, C. S., for the defendant, objected—because they must be now

taken as not forming any part of the record.

ABBOTT, C. J. I think, that as it will be competent to the plaintiff to prove

by distinct evidence the fact of the pleas having been pleaded, and afterwards withdrawn, it is just as well to take it from the engrossed record.

Evidence was afterwards given of this fact aliunde. The libel was read.

It was headed as follows: "Alleged Rape and Death, and Coroner's Inquest." It purported to be an account of the proceedings at a Coroner's Inquest holden on the body of a girl named Maria Webb, who died of a miscarriage; and among other circumstances it stated, that Webb, the brother of the deceased, said before the Jury, that the deceased told him, shortly before she died, that East (the plaintiff) had taken liberties with her, and had had connection with her by violence. The account went on to say, that Mr. Shearman, the surgeon, and Mrs. Buckingham, corroborated the evidence of Webb; and concluded by stating, that the Jury warmly declared their opinion of the conduct of Mr. East, and expressed their readiness to render any assistance in their power in bringing him to justice.

Denman, C. S., for the defendant, inquired of the Court, whether he was at liberty to give evidence as to the fact of what was stated having taken place at

the inquest.

ABBOTT, C. J. You must tender the evidence, and let us hear whether it is

objected to.

Denman, C. S., then proceeded to address the Jury, and was contending that the defendant was entitled to a verdict on account of the correctness of the report, when he was interrupted by

ABBOTT, C. J., who said, that he was clearly of opinion, that the proposed

evidence, if receivable at all, could only be so in mitigation of damages.

Denman, C. S. The only way in which I can put it for the verdict, is, that the Jury may say, that, considering the occasion, it is an innocent publication.

*Mr. Bell, the clerk to the Coroner, was called on the part of the defendant; and stated, that he was present at the inquest alluded to in the libel, and that William Webb, the brother of Maria, the deceased, was examined as a witness. Mr. Bell stated, that he was present when the Jury returned their verdict; and he produced the inquisition. The finding of the Jury was, that the deceased died by the visitation of God, and not otherwise.

The following question was then put to the witness:-"Did you hear the Jury by their foreman accompany the verdict with any observations touching

the subject matter of the inquisition, or touching the present plaintiff?"

Scarlett, for the plaintiff. I shall not argue the point as to the propriety of this question: I only wish it to be understood that I do not consent to the reception of the evidence, if your Lordship shall be of opinion that it is not receivable consistently with law; and for this reason, that the briefs for the plaintiff originally contained evidence to rebut the special pleas; but those pleas being withdrawn, the plaintiff has not now his witnesses in Court. your Lordship thinks, that on general grounds the evidence is admissible, I shall not offer any argument on the subject.

ABBOTT, C. J. It appears to me, that I am bound to decide, without reference to what has taken place with regard to pleading any matter, and afterwards withdrawing it; and being required so to do, I am of opinion, that the evidence is to be received, but only in mitigation of damages. If the evidence could lead to a verdict, I should be most clearly of opinion that it could not be received; for he who would allege the truth of a libel, is bound to do so by a plea on the record; and there being no such plea in the present case, I am clearly of opinion that such evidence, whatever it may be, cannot be received as going to the verdict, but as evidence to guide the Jury in the estimation of damages. I do not say generally that such *evidence is admissible, but I think it is so under the circumstances of this case. That which is short of the justification, may, I think, be received in mitigation of damages. It is a question of great importance; and I am ready to be set right in any way, if my opinion should be wrong.

The examination of the witness was then resumed; and he stated, in answer to the question, that the Jury generally expressed themselves indignantly as to the supposed conduct of the plaintiff, and offered Webb their assistance in any way in bringing him to justice, and that several of the Jury observed, that they

were willing to subscribe for the purpose.

The witness then proceeded to give further evidence of what took place at the inquest, (but which was not taken down in writing.) and was asked by Scarlett, on his cross-examination, whether the MS. of the libel was not in his handwriting. He appealed to the Court to say, if he was bound to answer.

ABBOTT, C. J. I think, having given evidence, you must answer the question. You might have objected to give evidence at first; but having gone through a long history of what passed, and was not taken down, you must

still go on, otherwise the Jury will only know half of the matter.

The witness then acknowledged that it was his handwriting. Several other witnesses were called; but from their evidence it appeared that the report in the libel varied in several particulars from the facts as they took place at the inquest, particularly in that part where it was stated that two witnesses corroborated the evidence of Webb.

ABBOTT, C. J., in his summing up (inter alia) said,—Whether the evidence received in mitigation of damages was admissible or not, may perhaps be matter of doubt; *but where there is doubt, I think it best to receive it. [*574 Now, however, the evidence is received, it appears clearly, that in whatever way it is taken, whether as matter of justification or otherwise, it is not sufficient to sustain the defence; because the libel states that two witnesses corroborated the evidence of Mr. Webb, and it appears that there was no corroboration of that part of his testimony which relates to the alleged rape. It is said to be the duty of a newspaper editor to publish such accounts as these. I do not know that the duty of an editor of a newspaper differs from that of any other person. I take it to be the duty of every man, whether editor, publisher, or speaker, to take care that what he utters may not have the effect of injuring the character of another. Editors of newspapers also should confine themselves to truth, for another reason, viz., that things not true, though they may not consist of reflections on the character of another, yet may mislead the public, and leave false impressions on the mind of the reader.

Verdict for the plaintiff.

Scarlett, and Chitty, for the plaintiff.

Denman, C. S., and Brougham, for the defendant.

[Attornies—Gregory & Son, and Willett.]

HEWLETT et al., Executors and Executrix of JUDKIN, v. LAYCOCK et al.

When a cause is referred to arbitration, the mode of conducting it must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attornies, and examine witnesses privately, at their (the witnesses) boases, it seems that such conduct is no good ground of objection, provided it does not proceed

from corrupt motives. At all events, if either party would take advantage of it, he must give notice at the time that he intends to rely on it as an objection; and if he lie by and suffers other meetings to take place, and when the arbitrators are ready to make their award, revokes his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award.

The declaration stated, that by an order of Mr. Justice BAYLEY, of the *575] 10th of March, 1824, a cause between the *plaintiffs and defendants, together with all matters in difference, was referred to the arbitration of three persons, one of them to act as umpire; and that the defendants, when the said umpire was about to make his award, revoked their submission, whereby the umpire was prevented from making an award, and the plaintiffs lost the benefit which they would have derived from the reference.

It appeared that the arbitrators, after the first or second meeting, which was in the month of April, 1824, refused to allow the attornies for the parties to attend the meetings, and at a later period excluded the parties themselves; and they also examined witnesses at the witnesses' own houses, and said they so acted to prevent altercation and delay. The attornies protested against such a course of proceeding, but did not give any notice that they should consider it a ground of objection to the award. Other meetings were afterwards had, and on the 20th of December, when the arbitrators were ready to make their award, the defendants revoked their submission. It appeared that the award would have been in favor of the plaintiffs.

Marryat, for the defendants. This is a case very much of first impression. -The plaintiffs will have a right to begin de novo for any cause of action which they rightfully have. But they cannot recover in this action; because the arbitrators acted illegally in deciding not to admit the attornies. The arbitrators had no right to examine witnesses privately; and if they were not warranted by law in acting as they did, then the revocation was correct, and no action There was not a sufficient reason for the exclusion of the attornies. the arbitrators misjudged, that is enough: it is not necessary to show any improper feeling. Arbitrators may be imposed upon, if the parties or their attornies are not present to suggest questions relevant to the subject of examination. *Scariett, for the plaintiff. The refusal to admit the parties, if done *576] corruptly, would be a good ground of objection, and in such case no revocation would be necessary. Perhaps, at the time of the refusal, the parties might have revoked the submission, but they suffered the arbitration to go on, and kept their objection as it were in petto, to be used or not, according to the way in which the award should appear likely to go. The neglect to give notice of any objection, on the ground of exclusion or any intention to revoke on that ground, must be considered as an acquiescence or waiver on the part of the desendants.

Abbott, C. J. The reason urged in support of the revocation is, that the arbitrators thought proper to exclude the parties and their attornies, and to examine a witness at his own house. I do not see why they might not examine the witness at his own house as well as elsewhere, as they were to examine the witnesses separately. I think, taking all the evidence together, that neither of the arbitrators intended to act otherwise than honorably and honestly in the transaction. But it is said, that the defendants had a right to make the revocation in point of law. I do not think it necessary to decide that point, because I am-perfectly satisfied, in point of law, that if a party means to object on such a ground as that which is relied on in this case, it is his duty to give notice that he means to rely on it, otherwise it is no answer. For unless he gives such notice, the arbitrators go on thinking that the objection is waived, and the parties are put to unnecessary expenses. As to the exclusion complained of, I think it right, in my situation, ω say, that where parties refer to a private tribunal, the mode of conducting the inquiry must be left to the arbitrators, and there may be circumstances in which it is important to exclude attornies.

There is less reason certainly for excluding the parties themselves, but where both parties are excluded, there is no reason of complaint.

Verdict for the plaintiffs.

*Scarlett, and Campbell, for the plaintiffs. Marryat, and Moody, for the defendants.

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[Attornies—North & S., and Stevens & W.]

RANDALL v. EVEREST.

Whatever may be the terms of an agreement with regard to the sum to be paid on the non-performance of it, the party suing, if the agreement is not under seal, is entitled only to such damages as a Jury, under all the circumstances, shall think fit to award.

Assumpsit. The plaintiff sought to recover a sum of 1001, to part of which he claimed to be entitled, in consequence of the non-performance of an agreement. The defendant contended that he was only entitled to a smaller sum.

ABBOTT, C. J., (in his summing up.) made the following general observations: I am of opinion, and I shall act upon that opinion, until I am corrected by a higher authority, that on any agreement, for the non-performance of which damages are sought to be recovered, whatever may be the expressions used by the parties, and in whatever mode or form the agreement may be made, whether the stipulation is for a sum to be paid as liquidated damages, or for a sum in the nature of a penalty, the plaintiff shall recover such damages as, upon a view of the whole case, the Jury shall think fit to give, and no more.

The Jury found for the plaintiff.

Damages, 100%.

ABBOTT, C. J., then said—I wish my observations to be understood as not applying to agreements under seal.†

Marryat, and Abraham, for the plaintiff.

Gurney, for the defendant.

[Attornies-Matanle, and Glynes.]

† For the note of these observations, we are indebted to the kindness of a friend a the bar.

*HUNTER v. WESTBROOK.

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A father gave his son a watch, some printed books, and several articles of wearing apparel. Held, that though the son was under age, (viz. about sixteen years old,) the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son.

Trover by the father of a youth about sixteen years of age, (who had been prenticed to the defendant, in the business of a chemist and druggist, and had

left his master without his consent,) to recover a watch, some printed books, and several articles of wearing apparel, which it was alleged the defendant refused to deliver up.

On the cross-examination of the son, who was called as a witness in support of the plaintiff's case, he said, that the articles in question had been given to him by his father.

ABBOTT, C. J., upon this intimated to the plaintiff's counsel, that he thought

the plaintiff must be nonsuited.

Campbell, for the plaintiff, submitted that the son was not emancipated, and that the property must be considered as belonging to the father. It had been decided, that in an indictment, property in the situation of that sought to be

recovered in this action, might be laid as the property of the father.

ABBOTT, C. J. I am of opinion that the action is not maintainable. I believe it has been held, that things stolen from a child may be laid to be the property of the parent, but I think that has been in the case of very young children. There must be a right of possession to maintain trover, which right this plaintiff has not. I am clearly of opinion that the plaintiff cannot recover.

Nonsuit.

Campbell, for the plaintiff, requested leave to move to enter a verdict for a shilling damages.

ABBOTT, C. J., inquired if there was any other defence.

*Denman, C. S., replied in the affirmative.

His Lordship then said that he could not give the leave requested. Campbell, and R. V. Richards, for the plaintiff.

Denman, C. S., and Payne, for the defendant.

[Attornies-Van Sandau & Co., and Pringle.]

MAUD v. WATERHOUSE.

If a person employed by the administrator of a deceased debtor, to wind up the concerns of the deceased's business, give an undertaking to a creditor of the deceased, to furnish money to meet an acceptance which such creditor has given, in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt.

Assumpsit on an undertaking given on the 16th of September, 1825, to pay on the 20th of December, 1825, a bill of exchange, dated the 19th of September, for 2671. 12s., which bill it was alleged the plaintiff accepted, for the accommodation of the defendant.

From the evidence for the plaintiff, it appeared, that, in the year 1823, the plaintiff sold goods to a person named Willis, trading under the firm of Willis & Co., for the price of which goods, in the year 1824, he drew a bill on Willis, which was accepted by him. This bill became due in February, 1825; but in the month of January, 1825, Mr. Willis died, and his representatives not paying the bill, the plaintiff was obliged to take it up. After he had paid it, he wrote the following letter to the defendant, who had been a clerk in the house of Willis & Co., and still continued to manage the business of the concern:—

" 15th April, 1825.

"Mr. Maud presents his compliments to Mr. Waterhouse, and as he finds the Jamaica Packet has arrived, would feel obliged to him if he would name to his son some mode of receiving value for the outstanding acceptance of Messrs. J. Willis & Co. He has heavy engagements at this moment, and it would be of great service to him," &cc.

To his letter the defendant, on the same day, wrote the following answer:-

Dear Sir,—In reply to your note handed to me by your son, I have to assure you that Mr. Willis and myself are aware of the inconvenience to yourself by the nonpayment of the acceptance of John Willis & Co., and at the same time feel equally disposed to offer the only remedy in our power, which would be by your drawing at two months the amount of the former acceptance on me, being authorised by Mr. B. Willis to conduct the mercantile concern of the late firm. If this mode will be available to yourself, I am perfectly conformable to it. I remain, &c.

John Waterhouse."

A bill of exchange was accordingly drawn by the plaintiff, and accepted by the defendant, dated the 16th of April, 1825, at two months. A few days before this bill became due, the plaintiff called on the defendant at the counting-house, who told him that no funds of Willis & Co. had arrived, and he could not pay the bill. The plaintiff said that he could not ask his banker to discount for him another acceptance of the defendant, and suggested that the defendant should draw and he accept a bill at three months from the expiration of the other. This was agreed upon, and the defendant, at the plaintiff's solicitation, gave him an undertaking in the following form:—

"Lime Street Square, 14th June, 1825.

"Dear Sir,—I engage hereby to furnish you with the amount of the acceptance drawn by me on the 17th September, say 2671. 12s., due on the 19th of the same month. I am, &c.

John Waterhouse."

After this it was agreed that a further bill should be drawn and accepted by the same parties, at three months *from the expiration of the other, and this was the bill on the undertaking to pay which the plaintiff sought to recover. That undertaking was in the following words, and was written at the foot of the former undertaking:—

"16th September, 1825.—The above having been renewed, I engage to hand Messrs, Maud & Co. the same amount on the 20th December."

On the part of the defendant it was proved, that he was only an assistant in the house of Willis & Co., that he had no interest whatever in the goods sold, and that he only superintended the concern since the death of Mr. J. Willis, at the request of his son Mr. B. Willis, who was his administrator. It was also proved that no funds had come to the hands of the defendant on account of the concern, which he could apply to the discharge of the plaintiff's claim.

Scarlett, for the desendant, upon this contended, that there was no consideration for the desendant's undertaking. He had no interest in the goods. He was merely employed as a clerk to wind up the concern, and not to make himself liable. Between the plaintiff and desendant there was no consideration at the first. The desendant is not the administrator, but was only employed by him.

Gurney, for the plaintiff. It is a sufficient consideration that the plaintiff forbore to press his demand against the house of J. Willis & Co. The defend-

ant's letter states that he was employed to conduct the concern. If he had not intended to make himself personally liable, he would have signed his undertaking on behalf of B. Willis, the administrator.

ABBOTT, C. J. I am of opinion that there is a sufficient consideration to sustain the action. The arrangement *had the effect of preventing the *582] sustain the action. The arrangement has the plaintiff is entitled to a verdict.

Verdict for the plaintiff,

Gurney, and Stephen, for the plaintiff. Scarlett, and Payne, for the defendant.

[Attornies—Forbes, and Cranch.]

COURT OF COMMON PLEAS.

SECOND SITTINGS AT GUILDHALL, IN HILARY TERM 1827.

BEFORE LORD CHIEF JUSTICE BEST.

TINSLEY v. NASSAU, Esq.

Trespass does not lie against a sheriff to recover damages for the seizure of property by his bailiff, under a writ of levari facias issued on a suit in the county court, because the sheriff is, in such case, a judicial and not a ministerial officer.

Trespass against the sheriff of Essex, to recover damages for the seizure of a horse which it was alleged belonged to the plaintiff.

The horse was seized as the property of Joseph Tinsley, a brother of the plaintiff's, who had been sued in the county court of Essex; and it was taken

under a writ of levari facias by the bailiff of the defendant.

Brodrick, for the defendant. This action cannot be maintained against the sheriff, because there was an action brought in the county court, of which the sheriff is a constituent part and not a mere officer. And the bailiff in this case stands in the same relation with regard to the sheriff as the sheriff in any of the superior courts does with regard to the court itself. Holroyd v. Breare & *Holmes,† is in point upon this subject; and that case has been since acted upon by Mr. Justice Bayley, on the Northern Circuit. the case of a court baron; but the court baron and the county court are similar, as in both the suitors are the judges, and the sheriff in one case and the steward in the other are judicial officers.

^{†2} B. & A. 473. The steward of a court-baron is a judicial officer; and trespass will not lie against him, where his bailiff, by mistake, took the goods of B., under a precept commanding him to take in execution the goods of A.

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The writ was read. It was directed to the bailiff by the sheriff, commanding him to levy, &c., and ended with the words: "and have you there the said money," &c., the usual conclusion of an authority to seize given to a bailiff by the sheriff being, "that I may have the said money," &c.

Wilde, Serit., for the plaintiff. The form of the writ by the sheriff will not

conclude the question.

BEST, C. J. I apprehend that the sheriff sits in the county court as the first freeholder in the county, the other suitors are also judges; but the sheriff is the principal, and a sort of chief justice.

Wilde, Serjt. The sheriff is indemnified by the plaintiff.

BEST, C. J. That cannot make any difference.

Nonsuit

Wilde, Serjt., and R. V. Richards, for the plaintiff. Brodrick, for the defendant.

[Attornies-Jones, and North & S.]

•SITTINGS AT WESTMINSTER, AFTER HILARY [•584 TERM, 1827.

FRIEND v. HARRISON.

In an action on an annuity bond given by a man to a woman with whom he cohabits, the question for the consideration of the Jury is, Whether at the time when it was given there was or was not an intention and agreement to continue the connection in fature. For if there was such intention, and the bond was given in furtherance of such arrangement, the plaintiff cannot recover.

DEST on a bond by which the defendant engaged to pay the plaintiff an annuity of 50l. a year. The defendant pleaded first, non est factum; and secondly, that the said plaintiff ought not to have and maintain her action against him, because the said writing was executed and delivered by him the said defendant to the said plaintiff, in consideration of the said plaintiff's then and there agreeing with the said defendant unlawfully and immorally to cohabit and commit fornication with the said defendant, after the execution of the said writing.

The bond was dated the 6th of January, 1824, and it appeared that the plaintiff, who was a common prostitute at the time when the defendant first became acquainted with her, had cohabited with him for two years before the bond was given, and that she continued to cohabit with him till the end of Fto ruary, 1824, when she went down to Folkstone, in Kent, and lived for three months with her friends. After this she came again to London, and renewed her connection with the defendant.

BEST, C. J., in his summing up, said—It is important to the public that the principles should be well known upon which this case must be decided. If this defendant had seduced the plaintiff, and afterwards, wishing to discontinue his connection with her, and by way of atonement, and to keep her from the

same way of life in future, gave her the bond in question, no person, in point of morality or of law, can have a stronger claim on the defendant's property than she has. But it is abundantly clear that there was nothing like seduction in this case. The defendant *found this woman a common prostitute. But if a man takes a prostitute, and cohabits with her, and afterwards, being desirous of putting an end to the connection, in order to prevent the woman from continuing in a course of prostitution, gives her an annuity bond, he will be answerable in an action upon it; therefore, if the defendant in this case acted with this intention, he is liable. But there is another view which may be taken of a case like this. Persons who connect themselves with women of this description often become extremely attached to them; and the women, aware of that, threaten to put an end to the connection, unless some permanent provision is made for them. If, therefore, the plaintiff obtained this bond from the defendant, intending at the same time to continue the connection, then I am of opinion that the special plea is proved. The learned Serjeant, for the plaintiff, says that you must be satisfied that there was an agreement when the bond was given to continue the connection; that is a matter of which you cannot have express evidence; but it may be made out from the other facts of the case. His Lordship then left it to the Jury, who found a

Verdict for the plaintiff.

Peake, Serjt., and Hutchinson, for the plaintiff. Vaughan, Serjt., for the defendant.

[Attornies—Blacklow, and Roberts.]

BUTLER v. TURLEY.

In an action for false imprisonment the defendant justified under the 1 Geo. 4, c. 56, (commonly called the petty trespass act.) as the owner of land on which the plaintiff was trespassing. It was held that to make out his justification he must give positive proof of actual damage being done, so as to enable the Jury to decide on the quantum of it; and that the Jury were not to presume damage from the mere fact of a trespass being committed. Semble, that the principle of this decision will apply to the substituted provisions of the 7 & 8 Geo. 4, c. 30, the above act of 1 Geo. 4, having been wholly repealed by the 7 & 8 Geo. 4, c. 27.

False imprisonment. The defendant justified the imprisonment, on the statute 1 Geo. 4, c. 586 56,† commonly called the Petty Trespass Act. The plaintiff's wit-

† This statute enacts, that "if any person or persons shall wilfully or maliciously do or commit any damage, injury or spoil, to or upon any building, fence, hedge, gate, stile, guide post, mile stone, tree, wood, underwood, orchard, garden, nursery ground, crops, vegetables, plants, land, or other matter or thing growing or being thereon, or to or upon real or personal property of any nature or kind soever, and shall be thereof convicted within four calendar months next after the committing of such injury, before any justice of the peace for the county, riding, division, city, town or place where such offence shall have been committed, either by the confession of the party offending, or by the oath of one or more credible witness or witnesses, or of the party aggrieved in the premises, which cath such justice is hereby empowed to administer, every person so offending, and being thereof convicted as aforesaid, shall forfeit and pay to the person or persons aggrieved, such a sum of money as shall appear to such justice to be a reasonable satisfaction and compensation for the damage or injury or spoil so committed, not exceeding in any case the sum of five pounds."

The 3d section enacts, "that it shall and may be lawful to and for any constable or other peace officer, and to and for the owner or owners of any property so damaged, injured or spoiled, and to and for his, her or their servant or servants, or other person or persons

nesses stated, that on Sunday, the 5th of November, in the morning, the plaintiff and two others were walking in the Edgware Road, and turned into a field belonging to the defendant; that there was a board at the corner pointing out the footway to Willesden Green, and several other places; that they went along a path leading to some cottages into a second field, where they met the defendant; that there was an appearance of a continuation of the path, and an open gap in the hedge; that the defendant called to them, and told them that they were not in the right footpath; that they did not answer, but turned out of that path, and went into the path which they had left; that the defendant's servant came up and laid hold of the plaintiff, and said they had no business there, and should go back, for there was no *path there; upon which the plaintiff said, that he considered he was in the right path, and would not go back: that they then got into a third field, where the defendant collared the plaintiff; that they then went out into the lane, and the defendant went before them and stopped them; that a person came up and said they were respectable tradesmen, and he would be answerable for their appearance; that the defendant then said he would have his revenge; that a eonstable was then sent for, and told to take charge of them: he said, he knew them all, and would be answerable for their appearance; but the defendant said, he would insist on their being locked up, and would abide by the consequences; that they were then locked up in the cage, and remained there till half past seven in the evening, when they were released by a magistrate residing in the neighborhood. One of the plaintiff's companions stated, that while they were in the third field, he (the witness) told the defendant, that if they were in the wrong path, it was the board that misled them, and if they had done any damage they would pay him for it. The defendant replied, that they had not done him any damage, but that they had no business there. The defendant gave charge of them for a trespass.

acting by or under his, her or their authority, and to and for such person or persons as be, she or they may call to his, her or their assistance, without any warrant or other authority than by this act, to seize, apprehend and detain any person or persons who shall have actually committed, or be in the act of committing, any offence or offences against any of the provisions of this act, and to take him, her or them before any justice of the peace for the county, city or place where the offence or offences shall be committed; and such justice is hereby empowered and required to proceed and act, with respect to such offender or offenders, in manner by this act directed."

This statute is wholly repealed by the stat. 7 & 8 Geo. 4, c. 27, and in lieu of its provisions, the 24th and 28th sections of the 7 & 8 Geo. 4, c. 30, entitled "An Act for consolidating and smending the laws in England, relative to malicious injuries to property," enact as follows:—"That if any person shall wilfully or maliciously commit any damage, enact as follows:—"That it any person shall wilfully or malicrously commit any damage, injury, or spoil to or upon any resl or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every negative imposed by a justice of the peace under this be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money, together with costs, (if ordered.) shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common jail or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any treepass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such treepass shall be punishable in the same manner as before the passing of this act."

Sect. 28.—"That any person found committing any offence against this act, whether the

same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighboring justice of the peace, to be dealt with according to law."

A witness was called for the defendant, who stated, that the plaintiff's party were out of the foot-path in the defendant's field; that the defendant told them they should not walk there; but they broke through a hedge; and that they struck the defendant. The witness added, that there was not much grass, and that he could not say that any damage was done.

BEST, C. J., upon this, observed—I think there is an end of the justification. I think there must be some damage; and if you cannot prove it by witnesses,

the case is not within the act of Parliament.

Cross, Serjt. The witness cannot specify the particular blades of grass

which were injured.

*BEST, C. J. That is not necessary. But an act of Parliament which puts the liberty of the subject in danger, ought to receive a strict construction; and I think it is not every walking over another man's land for recreation, if no damage is done, that constitutes a case within the meaning of this act. You must make out actual, positive damage: imaginary damage will not do. There is imaginary damage in every walking over grass land; and for this you may bring your action, if you are sufficiently ill-natured; but you cannot proceed under this act of Parliament. I do not think the party has committed an offence within the spirit of the act. It is improper and vexatious, in fields in the neighborhood of a road, to be subject to this kind of conduct; but until it is proved that there has been actual damage, it is not within the act.

Cross, Serjt. This is a case in which a party has notice, and is requested

to depart. We should recover damages in an action of trespass.

BEST, C. J. On the plaintiff's own evidence, I should say that he was a wilful trespasser; but it is not because a man is a wilful trespasser that another has a right to take him up, and keep him in custody from Sunday till Monday morning.

Cross, Serjt. It is for the Jury, and not the witnesses, to estimate the

quantum of damage.

BEST, C. J. I shall tell the Jury, that this is a case in which they are not to presume damage, but must be quite satisfied that damage has actually been

done, so as to be able to assess the quantum of it.

A second witness was then called for the defendant, who confirmed the statement of the first, and said, in addition, that the defendant several times *590] asked the plaintiff's *party for their names, but they refused to give them. On his cross-examination, he said that people were in the habit of walking in the direction in which the plaintiff walked, and he had often sent them back; and that the plaintiff and his party said in the evening, that they were sorry for having trespassed, and would pay 5s. for the damage, and the trouble of taking them into custody. The witness added, that from the appearance of the fields, persons might suppose that there was a footpath in the direction spoken of, but that they could not suppose there was any right of way.

Voughan, Serjt., in reply. The act is only intended to apply to cases where the party designs to do an injury to the owner of the land, and goes for that purpose. There must be a premeditated design to do injury. The appearance of the path creates a special exception in favor of the plaintiff,

under the words of the 6th section of the stat. 1 Geo. 4, c. 56.†

† That section enacts, "that nothing in this act contained shall repeal or affect any act or acts now in force, whereby any person or persons may be subject to punishment for wilful and malicious acts of trespass to any property, either public or private, or shall extend to any case of wilful or malicious mischief or trespass to private property, in which the damage claimed shall exceed the sum of five pounds, or to any case wherein it shall appear to the satisfaction of the justice or justices before whom the complaint is made, that the party trespassing acted under a fair and reasonable supposition that he had a right to do the act to the property in respect whereof the trespass was committed or alleged to have been committed, or to do or commit the act complained of; or shall have committed

BEST, C. J. The act was intended to enable the owners of land to recover compensation from persons doing actual *damage to their property, and [*50] not in a situation to make it worth while to bring an action against them. If you think, on the evidence, that any actual damage was done, on any part of the defendant's premises, then you may find a verdict for him on the special plea. If the plaintiff mistook the track for a public footpath, then there will be an end of the justification, on the ground that the trespass was not malicious;† but I think it is impossible to say that he mistook the gap in the hedge for a public way. His Lordship left the question to the Jury, who found a

Verdict for the plaintiff.—Damages, 40s.

Vaughan, and Wilde, Serjts., and Campbell, for the plaintiff. Cross, Serjt., and E. Lawes, for the defendant.

[Attornies—Carlon, and Wright.]

such trespass in hunting, or being a qualified person, and having duly obtained his certificate authorising him to kill game, shall have committed the injury complained of in the pursuit of any kind of game." For this sect. the proviso, sate, p. 587, n., is substituted. † By the 25th sect. of the stat. 7 & 8 Geo. 4, c. 30, it is enacted, "that every punishment and forfeiture, by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment, or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice coecived against the owner of the property in respect of which it shall be committed, or otherwise."

HILTON v. GOODHIND.

If there be a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170% a-year, and afterwards an arrangement is made by parol that 30% a-year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it; and therefore an allegation is correct which states it to be 170%.

REPLEVIN. Cognizance by the defendant as the bailiff of one Ward, under whom the cognizance averred that the plaintiff held premises at a certain

yearly rent, to wit, the rent of 170l.

It appeared that a written agreement had been entered into between the plaintiff and Ward, in which the rent was stated to be 1701.; but after that agreement was signed, it was arranged by parol that the sum of 301. a-year should be allowed out of it, because the landlord, Ward, was to ccupy a part of the premises by his horses for a time. The horses were still there; and a witness proved, that the plaintiff said, that he would not have that part of the premises at all.

Taddy, Serjt., submitted, that, according to the evidence, the real rent payable by the plaintiff to Ward was 140l. only, and therefore, that the cognizance, which stated it to be 170l. was not proved. He said, that about five years ago a similar objection was allowed in a case on the Home Circuit, which was

tried by Baron Graham.

BEST, C. J. The plaintiff is tenant of the whole to Ward, and permits Ward to occupy a part; that is, at the utmost, a tenancy at will, and the plaintiff may have it determined at his pleasure. It is a letting of the whole, with a sub-letting of a part, or rather a license to use it. The verdict must be for the defendant.

Verdict for the defendant.

Taddy, Serjt., and ———, for the plaintiff. Vaughan, Serjt., and Abraham, for the defendant.

[Attornies—Hallett, and Pittmen.]

ADJOURNED SITTINGS AT GUILDHALL, AFTER HILARY TERM. 1827.

STERRY v. FOREMAN.

An allegation in a declaration in slander, which states, that "by reason of the premises, divers persons, to wit," &c., "who would otherwise have retained and employed the plaintiff, wholly declined and refused so to do," is not supported by evidence which shows that other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed him on such recommendation.

SLANDER, for words spoken, on the Royal Exchange, of the defendant, whose business was that of a master or ecaptain in the merchant service. The declaration averred, that by reason of the premises, divers persons [naming them] who would otherwise have retained and employed the plaintiff as master, for a reward to be paid to him, wholly declined and refused so to do.

Two witnesses were called, who stated that they would have recommended the plaintiff to the employment of the persons named in the declaration; and those persons proved, that on such recommendation they would have employed him.

This was the only evidence given in support of the allegation.

Spankie, Serjt., objected, that the special damage was not proved as laid, because the persons alluded to did not refuse to employ. It is true they did not employ; but that was not on account of the slander, but on the ground of the non-recommendation.

BEST, C. J., allowed the objection. Wilde, Serjt., and Platt, for the plaintiff. Spankie, Serjt., for the defendant.

[Attornies-Drew, and Lowless & B.]

DOE, on the demise of PALMER, v. ANDREWES.

The interest of an insolvent debtor in premises held by him from year to year, under an agreement for a lease, passes by the assignment to the provisional assignee, so as to prevent the insolvent from maintaining ejectment against his tenant with respect to the same, notwithstanding no act has been done by such provisional assignee, to show his acceptance or his refusal of the lease.

ETECTMENT. 'The defendant was tenant to the lessor of the plaintiff of part of a house in *Birchin-lane*, and paid rent to him up to *Christmas*, 1824. A

tenant of another part of the same house proved that, in 1825, a distress was put into the house by the superior landlord, and that the defendant paid 151. 15s., for his proportion up to Lady-day, 1825. On the 22d of January, 1825, the interest of the lessor of the plaintiff in the premises was assigned under the Insolvent Debtors' Act, to the *provisional assignee of that court. It did not appear that there had been any assignment by the provisional assignee to any other person.

Spankie, Serjt., for the defendant. The defendant was compelled to make the payment up to Lady-day, 1825, to relieve his goods from the distress put in by the superior landlord. That payment was not a payment to Palmer. The defendant has not paid rent to Palmer since he became insolvent, at which time his legal interest in the premises was transferred by assignment to the provisional assignee under the Insolvent Debtors' Acts. The case of Crofts v. Petk is an authority to show that the provisional assignee has no discretion to reject. The provisions of the act vest the property in the provisional assignee, and it remains in him.

BEST, C. J., mentioned the case of Lindsay v. Limbert, ante, p. 526, decided last Term.

Spankie, Serjt. The property is divested from the original holder, and transferred to the provisional assignee for the benefit of the creditors. The assignee is at liberty, within a reasonable time, to reject the lease. This was the case in Lindsay v. Limbert. The provisional assignee has not rejected in this case, and therefore the interest is out of Palmer. In Lindsay v. Limbert, the only question was, whether the assignee should be liable to a burdensome consequence, and not whether the insolvent continued to have the property. The action of ejectment is founded on a legal title, and that Palmer has not not. The circumstance of contingent liability on the covenants, which are a personal contract, makes no difference. The notice to quit also, must be given by a person having the legal estate, otherwise it is of no avail, and does not make *the defendant a trespasser. The case of Doe v. Spencer, ante, [*595]

BEST, C. J., inquired if the provisional assignee had taken possession of the premises; and being answered in the negative, his Lordship said,—I consider that this case was in principle decided last Term. No property passes to the assignee, either in bankruptcy or insolvency, unless he agrees to accept it. It is clear that this property was rejected, as there has not been any subsequent assignment. I am clearly of opinion, that the lessor of the plaintiff is entitled

to a verdict.

Verdict accordingly.

Lawes, Serjt., and E. Lawes, for the plaintiff. Spankie, Serjt., and Abraham, for the defendant.

[Attornies—Croft & J., and Andrews.]

In the ensuing *Easter* Term, *Spankie*, Serjt., obtained a rule *nisi* for a new trial, which after argument was made absolute; the Court being of opinion that the property passed to the provisional assignee by virtue of the assignment under the statute, although no act had been done by such provisional assignee to show his acceptance of it.

HOGARTH et al. v. JACKSON et al.

By the usage of the whale fishery, a fish is to be considered as a fast fish, which is attached by any means (such as the entanglement of the line around it, &c.) to the boat of the first striker, though the harpoon does not continue in the body of the fish—and this is a more reasonable usage than that mentioned in a note to the case of Fennings v. Lord Grenville, in 1 Taunt. p. 243.

THE declaration charged the defendants with having interrupted the plaintiffs in killing a whale. There was also a count in trover for a whale.

The plaintiffs were the owners of a ship, called the Old Middleton, and the defendants the owners of another ship *called the Andrew Marvel, both of them engaged in the whale fishery. The plaintiffs' crew had struck a whale which was shortly after struck by the defendants' crew, and the question was, whether, at the time when the defendants' crew struck, the whale was what is called in the trade a fast or a loose fish.

The custom of the fishery as relied on by the defendants was that which was mentioned in a note to the case of Fennings v. Lord Grenville, 1 Taunt. 243, viz., that, "while the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish, and though during that time struck by a harpoon of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second; the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.

But the witnesses for the plaintiff proved it to be the uniform usage, that, whether the harpoon continues in the body or not, if the fish is attached by any means, such as the entanglement of the line, or other cause, to the boat of the party first striking it, so that such party may be said to have the power over it, it is considered as a fast fish, and cannot be taken by any other vessel.

BEST, C. J., in summing up, said—The custom mentioned in the case in *Taunton* differs from this, but I think this is the more reasonable custom, as, the fish being in the water, it is not easy to discover whether the harpoon is in its body or not.

The Jury, upon the facts, found that the fish was a fast fish, and gave a verdict for the plaintiffs.

*597] *Wilde, and Spankie, Serjts., and Chitty, for the plaintiffs. Taddy, Serjt., Brougham, and Alderson, for the defendants.

[Attornies-Blunt & Co., and J. E. Alderson.]

BANKS v. KAIN.

In an action of trover for goods, the party who sold them to the plaintiff, on an understanding that if they were not paid for they were to be returned, is a competent witness for the plaintiff, although he has not been paid, and the plaintiff's succeeding in the action will enable him to have them back.

TROVER for a table cover, and thirty-six chairs.—The plaintiff was the master of the ship *Haydon*, of which the defendant had a mortgage, under Vol. XII.—95

which ne had taken possession of the ship, and the chairs, &c., in question, which were in the cabin; and the dispute was, whether he had a right to retain them as belonging to the ship, or the plaintiff to recover them as his private property. For the plaintiff, the person of whom he bought the chairs was called as a witness. He stated, that they were sold on the understanding, that if they were not paid for, they were to be returned, and that he had not been paid.

Wilde, Serjt., upon this objected, that the witness was interested, because,

if the plaintiff recovered, he (the witness) could have the chairs back.

Taddy, Serjt., replied that the witness stood indifferent between the two parties, for if the goods were not returned he would be entitled to the price of them.

Wilde, Serji., observed, that there was a great difference between having the right to take the article itself, and being obliged to sue a man to obtain the price of it.

BEST, C. J. I think the witness is competent. It seems to me 'at he

stands indifferent between the parties.

Verdict for the p'

Taddy. Serjt., and Steer, for the plaintiff. Wilde, Serjt., for the defendant.

[Attornies—Cox, and D. H. Williams.]

*COURT OF KING'S BENCH. [*598

SECOND SITTINGS AT WESTMINSTER, IN EASTER TERM, 1827.

BEFORE LORD TENDERDEN, C. J.

UPSTON v. SLARK.

Evidence that at the door of a booking office, there is a board on which is painted, "conveyances to all parts of the world," and a list of names of pisces, is not sufficient proof that the owner of the office is a common carrier, so as to charge him for the loss of a box which was booked there.

CASE against the defendant as a common carrier, for the loss of a box. There

was also a count in trover. Plea-Not Guilty.

It appeared that the defendant kept a booking office in *Piccadilly*, at which parcels were booked for a considerable number of coaches and wagons, and that in *October*, 1826, the box in question was booked there, to go by the *Windsor* wagon. It was proved, that the defendant's name was painted over the door of the office, and that on a board at the side of the door was painted the words, "conveyances to all parts of the world," and this was followed by a list of names of places including *Windsor*. The box was never received at the place to which it was addressed.

Lord Tenderden, C. J. There is no proof that the defendant is a carrier;

the plaintiff has declared against him as a carrier.

Scarlett, A. G., for the plaintiff. The defendant opens his office to receive

parcels as a carrier, and we know no other.

Archbold, on the same side. Does not your Lordship think, that by opening an office of this sort, and painting up a list of places that goods will be conveyed to, he holds himself out as a carrier?

*599] *Lord Tenterden, C. J. We know that there are in this town, booking offices that do not belong to the carriers; and I am clearly of opinion that you cannot convert the keeper of a booking office into a carrier.†

The plaintiff's counsel wished to go on the count in trover; but it being proved on the part of the defendant, that his porter delivered the box in due course to a person named *Hunt*, who was a *Windsor* carrier, the plaintiff was Nonsuited.

Scarlett, A. G., and Archbold, for the plaintiff. Gurney, for the defendant.

[Attornies—Upston, and Robinson:]

† See Newborn v. Just, ante, 76.

\$ See the notes to the case of Griffiths v. Lee, aute, Vol. 1, 110, n.

SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1827.

INKFIELD et al., Assignees of ROBINSON, a Bankrupt, v. PACKING-TON, Bart.

If, Before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk who is transacting the business there, 2s. 6d. per cwt., and on the faith of this he sends the goods, the carrier cannot charge more, although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates in which 3s. 6d. per cwt. was set down for goods of the sort in question.

Assumestr for work and labor. Plea-General issue.

It appeared that Robinson the bankrupt had been a carrier by barges on the canals from London to Worcestershire, and that he had carried a quantity of trees for Sir John Packington, from Hammersmith to Hambury wharf,

"in the county of Worcester. It was proved that the regular price of the carriage would be 70s. per ton, and that the order given by Robinson to his clerks was to charge goods carried according to a printed book of rates, in which 70s. a ton was the price specified for trees.

The defence was this: That before the trees were sent, a person named

The defence was this: That before the trees were sent, a person named Lee (at the desire of the defendant) called at Robinson's wharf, at Hammer-smith, and asked at how much per ton, trees would be carried to Hambury wharf, and that the clerk who was in the office there replied, half a crown per

cwt. (which amount had been paid into court.)

Lord TENTERDEN, C. J. If a person goes to the office of a carrier, and asks what a thing will be done for, and he is told by a clerk or servant who is transacting the business there, that it will be done for a certain sum, the master can charge no more.

Denman, C. S. I submit, that, it being contrary to his orders, the clerk had no right to agree that the trees should be carried at a rate lower than that

expressed in the book.

Lord TENTERDEN, C. J. The only question is, whether the account given by the defendant's witness, that the clerk of the bankrupt said that the trees would be carried for half a crown a hundred, is correct. It is said that this person had no authority to make such a bargain; however, I am of opinion that it signifies nothing in this case, whether the bankrupt's servant did his duty, or made a mistake. For if the trees were sent on the faith that they would be taken at a given price, in consequence of what the clerk said, it is quite clear, that the plaintiffs can recover no more.

Verdict for the defendant.

*Lord Tenterden, C. J. If men were not bound by such bargains as this, business could not go on.

Denman, C. S., and Chitty, for the plaintiffs.

Taunton, and Russell, for the defendant.

[Attornies—Amory & Coles, and T. White.]

SITTINGS IN LONDON, AFTER EASTER TERM, 1827.

ROGERS v. HUNTER.

If a freighter is to discharge within twelve running days after the vessel's arrival; and he is prevented from discharging at first by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole original number of days from the time when he is able to commence discharging.

Assumpsit for demurrage. Plea—General issue.

It appeared that the ship *Thirza* sailed as a general ship from *Bremen* w *London*; and that the defendant had shipped a quantity of oats and beans on board her. The bill of lading was put in, and at the bottom of it was written, "to be discharged within twelve running days after the vessel's arrival, or w pay 21., British sterling, demurrage, for every day longer detention."

It was proved that the ship arrived in the river *Thames* on the 11th of *December*, 1826, and was reported on the 12th, and therefore, as the plaintiff contended, the twelve running days commenced on the 13th, and ended on the 28th of that month; however, in point of fact, the corn was not all landed till

the 2d of January, 1827.

Marryat, for the defendant. We are in a condition to show that from our goods being under those of other persons, who had also goods on board, we could not get at them so as to discharge them, till the 26th of December; and I submit that the number of days for discharging does not begin to run till we are enabled to get at our goods.

This was proved; but the witnesses admitted that the corn might have all

been landed in a smaller number of days,

*Lord TENTERDEN, C. J. It seems to me that the defendant cannot be said to detain the vessel, before he can get at his goods; but when he can, he is bound to use all reasonable diligence. I do not think that the defendant is, at all events, entitled to the same number of days, after the goods can be got at, as is specified in the contract; and the question will be, whether, adverting to all the circumstances, the defendant ought to have taken the goods out of the ship in a smaller number of days than he did.

Verdict for the plaintiff—Damages 81., being for four days' demurrage.

Scarlett, A. G., and Platt, for the plaintiff.

Marryat, for the defendant.

[Attornies-Warne & Son, and B. Lewis.]

DOD v. EDWARDS.

If the drawer of a bill payable to his own order, before it is indorsed, give the acceptor a general release; this is no defence to an action by an indorsee against the acceptor, unless there he proof that the indorsee knew of the release.

Assumes on a bill of exchange, dated September 13, 1826, payable three months after date, for 961. 11s. 7d., drawn by a person named Hobson, and accepted by the defendant, payable to the drawer's order, and by him indorsed to the plaintiff.

The plaintiff rested on the formal proofs.

Brougham, for the defendant. I am in a condition to show that the bill was indersed on the 21st of November, and that, on the 4th of October, the drawer put it out of his power to inderse, by giving a general release to the defendant.

LORD TENTERDEN, C. J. You must show that the plaintiff knew it. If you cannot show that the plaintiff was aware of the release, your defence fails; if it were not so, you would put an end to the circulation of bills.

*603] *Brougham. The party, by the release, puts all right out of him-

Lord TENTERDEN, C. J. It is quite clear that you must trace it to the plaintiff's knowledge.

Verdict for the plaintiff.

Scarlett, A. G., and Hutchinson, for the plaintiff. Brougham, for the defendant.

[Attornies—Reeves, and Cornthwaite.]

REX v. RAMSDEN et al.

If the counsel for the defendant, in cross-examination, put a paper into the witness's hand, to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And the opposite counsel may also ask the witness whea it was written, without being bound to put it in.

INDICTMENT for a conspiracy to sue out a fraudulent commission of bankrupt against two of the defendants.

The petitioning creditor, who was called on the part of the prosecution, stated, that he bought the debt upon which he became petitioning creditor six

months ago.

In his cross-examination, F. Pollock, for the defendant Ramsden, put a paper into his hand, which he acknowledged to be of his handwriting, and then asked him if he had not bought the debt nine months before; which he admitted he had.

Scarlett, A. G., for the prosecution, wished to look at the paper.

F. Pollock. I submit that my friend has no right to see it, unless he will read it in evidence.

Lord TENTERDEN, C. J. You put the paper into the witness's hand to refresh his memory. It is very usual for the opposite counsel to see it, and examine upon it, and I think he has a right to see it.

*Scarlett, A. G. Having looked at the paper, asked the witness if

he would swear that it was written at the time it bore date.

F. Pollock. I submit that this question cannot be asked without the paper

being read.

LOTG TENTERDEN, C. J. I think it may. You put the paper into the witness's hand, and I think the other side may ask when it was written, without being bound to read it.

The Jury found the defendants Ramsden and Clark guilty, and the defendant Cooke not guilty.

Scarlett, A. G., Gurney, Montague, and Busby, for the prosecution. Denman, C. S., F. Pollock, Brougham, Hutchinson, and D. F. Jones, for the respective defendants.

[Attornies—Hughes, for the prosecution; and Humphries and Isaacs, for the respective defendants.]

In Hardy's case, 24 How. State Trials, 824, Eyre, C, J., said, "It is always usual and very reasonable, when a witness speaks from memorandums, that the counsel should have an opportunity of looking at those memorandums, when he is cross-examining that witness. If there is any thing that you (the witness) say, upon your oath, does not relate to that subject, but to some other subject, to be sure it is impossible to be asked that that should be seen."

•ADJOURNED SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1827.

SMALL v. GRAY.

An action lies for maliciously holding a party to bail, although he is never arrested, but is told that there is a writ out against him, and he goes to the sheriff's officer and gives bail.

The first count of the declaration was for a malicious arrest. The CASE. second count stated—that heretofore, &c., the defendant not having any reasonable or probable cause of action against the plaintiff, for the amount of the sum of money for which he caused the plaintiff to be held to bail, as therein after mentioned: but contriving, &c., maliciously, &c., caused and procured, &c., a certain writ, &c., to be sued out, marked for bail for 301. "And the same writ being so marked and indorsed for bail as aforesaid, the said John afterwards, and before the said return thereof, to wit, on the same day and year last aforesaid, at Westminster aforesaid, in the county of Middlesex aforesaid, contriving and intending as last aforesaid, and without having any reasonable or probable cause of action whatsoever against the said Samuel, to the amount of 10l. or upwards, falsely and maliciously caused the said Samuel to be held to bail, under and by virtue of the said last mentioned writ, for the said last mentioned sum of 30%, and thereupon the said Samuel was then and there forced and obliged to, and did procure certain persons to become bail for the appearance of him, the said Samuel, in the said Court, to answer the said John according to the exigency of the said last mentioned writ upon that occasionwhereas in truth and in fact he the said John, at the time of suing forth the said last mentioned writ, and of the said holding of the said Samuel to bail. had not any reasonable or probable cause of action against the said Samuel, to the amount of," &c., (it then stated the termination of the suit;) by means whereof, &c. Plea-Not guilty.

It appeared that the writ was sued out, marked for bail as stated in the *606] declaration, and that a person named *Russell went to the plaintiff, and told him that there was a writ out against him, and that he must give bail to it, which he accordingly did; and evidence was gone into to show a want of probable cause.

Marryat, for the defendant. I submit that the plaintiff must be called. There was no arrest to support the first count of the declaration, and as to the second, there was nothing to compel the plaintiff to give bail; as the only thing which can compel a man to give bail is an arrest, which there was not in this case.

Lord TENTERDEN, C. J., (stopping Scarlett, A. G., and Campbell.) I am clearly of opinion, on this evidence, that the case must proceed on the second count.

Marryat then addressed the Jury, and went into a detail of facts to show that there was probable cause for the arrest: but his Lordship having looked at his notes of the trial of the case, in which the supposed malicious arrest occurred, said, that there would no doubt be much conflicting evidence on that point, and recommended that a Juror should be withdrawn. This was acceded to.

Scarlett, A. G., and Campbell, for the plaintiff. Marryat, for the defendant.

[Attornies—Carlon, and Younger.]

See the case of Berry v. Adamson, ante, p. 503.

THOMAS & NEWTON.

In an action by the indorsee against the acceptor of a bill of exchange, if the defendant show that there was originally no consideration for the bill: it then lies on the other party to show that he or some previous indorsee gave value for it.

Assumpsit on a bill of exchange, drawn by a person named Wilson on and accepted by the defendant and indorsed to a person named Dandridge, and by him indorsed to the plaintiff. The plaintiff rested on the formal proofs.

The defence opened was, that the bill was accepted for stock-jobbing differences; and *Wilson* the drawer was called to prove this: but he declining to answer, as he might subject himself to penalties, it stood on the evidence that

there was no valuable consideration for the bill.

Lord Tenterden, C. J. If the defendant shows that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by *Dandridge*: for if either the plaintiff or *Dandridge* gave value for it, the plaintiff may recover; otherwise the defendant is entitled to a verdict.

Verdict for the defendant.

Marryat, and Chitty, for the plaintiff. Gurney, for the defendant.

[Attornies—Harvey & Co., and Isaacs.]

COURT OF COMMON PLEAS.

ADJOURNED SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

BEESTON v. COLLYER.

The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent, receiving a salary of 500l. a year.

Assumpsit for wages as a clerk. The defendant was an army agent. The claim was for 83l., being a balance, at the rate of 500l. a year. An entry was read from the *defendant's books, of the date of the 24th June, 1811, in the following words, "Paid Mr. Beeston one quarter's salary, 125l."

The plaintiff continued in his situation till the 23d September, 1826, and during the last five or six years received his salary monthly. He had been paid in advance up to the 23d of January, 1827. On the 23d of September, 1826, a letter was written by the defendant to the plaintiff, declining any interview with

him, and stating that he would give him intimation when he had any thing for him to do. Matters continued in this state till the 23d of December, 1826, when the defendant wrote again to the plaintiff, stating, that as the business of the office did not require further assistance, he was under the necessity of informing him that the salary must cease at the time up to which it had been

paid in advance.

Wilde, Serjt., for the defendant. There is no difference between this case and the case of servants in general. The wages of such servants are reckoned after the rate of so much a year, and they are paid quarterly, unless their wants induce them to ask for payment oftener; and yet, notwithstanding this, they may be discharged at a month's notice. There is no evidence in this case of any offer by the plaintiff to do the work after December. The circumstance of payments being made for five or six years by the month, is stronger than the solitary entry spoken of in 1811. When extraordinary contracts are to be entered into, then writing is used; and the quantum of notice distinctly mentioned. An employer may discharge on giving reasonable notice; which notice, by custom, in the case of clerks and servants, is a month; and in this case there was a three months' notice as early as September, and another notice of a month in the December following.

BEST, C. J. The entry in the book is evidence that the plaintiff was a yearly-hired servant, to be paid at first by the quarter. The law I take to be this:—If a servant *is hired generally, he is considered as hired for a year, that both master and servant may have the benefit of all the seasons. In the case of household servants, it is the custom to give only a month's notice; but I know of no practice or usage (nor is there any evidence given of any usage) applying to the case of servants of the description of this plaintiff. A man in this class is not likely to be able to get a situation so soon as a butler or a footman can. As to the monthly payments, though the hiring was for a year, yet payments may be made at more frequent intervals. If it had been proved that the plaintiff betrayed the secrets of his employer, or was guilty of other misconduct, that would justify his dismissal without any notice at all; but no such evidence has been given. It seems to me, that no sufficient ground has been shown for putting an end to this contract; and therefore that the plaintiff will be entitled to recover up to the 25th of March.

Verdict for the plaintiff, 831.

Spankie, Serjt., and Courtney, for the plaintiff. Wilde, Serjt., and Pattison, for the defendant.

[Attornies-Andrews, and Robinson.]

In the following Trinity Term, Wilde, Serjt., obtained a rule nisi for a new trial, which in the same Term was discharged after argument.

See the case of Huttman v. Boulnois, ante, p. 510.

*FIRST SITTINGS AT WESTMINSTER, IN TRINITY TERM, 1827.

GRADDON v. PRICE.

a performer, who is called on to resume, in consequence of the illness of another, a part in which by previous performances she has acquired celebrity, is entitled to reasonable notice previous to the time of performance, such notice to be proportioned to the reputs-

Assumpsit by Miss Graddon the singer, against Mr. Price, the lessee of Drury Lane Theatre, to recover a balance of salary. All that was due had been paid, with the exception of a sum of 201., which, it was contended by Mr. Price, he had a right to detain for a fine incurred by Miss G., under the following circumstances: It appeared that Mrs. Geesin, who was advertised to play the part of Catherine, in the Siege of Belgrade, on a particular night, was, the day before, taken so ill as to render it impossible for her to appear according to her engagement: Miss Graddon, who some time before had been in the habit of playing the part, was, in consequence, sent for by Mr. Wallack, the stage manager, and informed that she would be required to undertake the part. She remained at the theatre, and went through part of the rehearsal, and then asked permission to go home, that she might read over the part, as it was some time since she had played it before. This was assented to by Mr. Wallack, and her name was advertised in the next day's bills to appear in the evening. About two o'clock, after the bills were printed, she sent a message to the theatre, stating, that she would not play, and in consequence, an apology was made for her non-appearance, and the part was performed by Miss Tree. part of the rules and regulations of the theatre, on which the defendant relied, was as follows:----Any one refusing to study, rehearse or perform at the appointment of the manager, shall forfeit 30l." It appeared that 10l. of this fine had been remitted.

Wilde, Serjt., for the plaintiff. The plaintiff had *acquired a certain celebrity by her previous performance of the part in question, and required more time to recover it, in order to keep up her reputation, upon which With respect to Miss Tree, who, it seems, undertook her fortune depended. the character, she had not acted it before, and therefore had no reputation to Have managers a right to exercise such control over the reputation of actors, as to ruin them by requiring them to act at too short a notice? I submit with confidence, that a performer is entitled to reasonable notice, in a case like the present, and that such notice must be proportioned to the reputation at stake. Failure, on a particular night, would not end with that night, but would be prejudicial beyond it. Under the circumstances of this case, I contend, that

the notice given was not reasonable notice.

Best, C. J. The services of the plaintiff in this case are admitted; and it is admitted also, that they are worth 101. a week, and that 201. is due to her, unless it has been properly deducted for a fine. I think that the proprietors of a theatre are perfectly right in having regulations, and enforcing them by the payment of fines. It is a duty which they owe to themselves and the public, for if performers should refuse to appear on the night for which they were advertised, the property in the house would be in danger of being injured by the audience; and I am sure that performers will find it their interest to submit to these fines, if they do not appear when the public have a right to expect I agree with my brother Wilde that the regulation relied on in this case must have a qualification. The jurisdiction of a manager is a very arbitrary one, but in this kingdom all arbitrary jurisdictions have a limitation. I allow that in this case there must be reasonable notice. It is said, that the plaintiff had sufficient notice for a person who had acted the same character before; and if you think it was so, that will get over the difficulty. But if you think she had not sufficient notice, for a performer *is not to destroy her reputation by taking a part in haste, then undoubtedly the defendant had no right to claim this fine, and the plaintiff will be entitled to a verdict for the amount.

Wilde, Serjt., and Hutchinson, for the plaintiff.—Damages, 20l. Adams, Serjt., and E. Lawes, for the defendant.

[Attornies—Righy, and Rice & R.]

OXFORD SPRING CIRCUIT.

1827.

BEFORE MR. BARON GARROW, AND MR. BARON VAUGHAN.

BERKSHIRE ASSIZES.

BUTLER v. BASING.

If a parcel be given to a wagoner for him to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. If a box of clothes, packed by the party's own hand, be sent by a carrier, and lost, the judge will recommend the Jury to give the fair value of it in damages, although what particular articles the box contained cannot be proved.

Assumest against the defendant as proprietor of a stage wagon going from

Reading to London, for the loss of a box.

It appeared that the plaintiff had been hired as a servant at the Star and Garter Inn, at Windsor, and that the box in question was sent by the defendant's wagon, to be left at the Black Boy public-house at Colnbrook. However, the plaintiff's brother, who carried the box to the Horse and Jockey Inn, at Reading, from which the wagon started, did not take it to the booking-office there, but gave it to the defendant's wagoner. The non-arrival of the box was proved, but no evidence was given of the particular articles which it contained

The defence, which was proved by the evidence of the wagoner, was, that this box was not sent by the wagon in the proper and ordinary course of business, but given to the wagoner for him to take, for his own gain, and no

for the profit of his master the defendant.

GARROW, B. (In summing up to the Jury.) There is no doubt that by law every proprietor of a stage wagon is liable for all risks, except those occasioned by God and the king's enemies; and to make such proprietors answerable, it is not necessary that you should call up Mr. Pickford or any of the other persons who are the owners of these vehicles, and deliver your parcel to them; but a delivery of the parcel to any of the meanest of their servants is quite sufficient, provided that servant, in receiving parcels, be acting by the authority or with the assent of his master. But it is equally clear, that if persons be foolish enough to send parcels by the wagoner, for a hire paid to

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him which is never intended to find its way into the pocket of the owner of the wagon, then the owner is not liable in case the parcel is lost; and the first question in this case, therefore, is, whether in receiving this box the defendant's wagoner was, as his servant, authorized by him to receive parcels to be carried by this wagon. With regard to the amount of the damages in case a verdict passes for the plaintiff, it is right that I should tell you that here is no distinct evidence of the contents of the box; however, I should recommend you not to pare down the amount of the damages, because the articles contained in it cannot be distinctly proved. It very often happens that persons, more especially those in the station of life in which the plaintiff is, pack their own clothes, and in such cases it must be always impossible to give evidence of the precise contents of their boxes or portmanteaus. I should therefore recommend you, if you find for the plaintiff, to give damages proportioned to the value of the articles which you in your judgment think the box might and did fairly contain. However, the great question *is, whether this contract to carry the box *615] However, the great question as, which was made by the authorized agent of the defendant, or whether it was a private bargain made with the wagoner for his own gain, and distinct from his master.

Verdict for the defendant.

Curwood, and Talfourd, for the plaintiff. Shepherd, for the defendant.

[Attornies-Vowles, and Graham.]

† In the case of Armory v. Delamirie, 1 Str. 505, the plaintiff, a chimney-sweeper's boy, having found a jewel, took it to the defendant, a goldsmith, to know what it was. The defendant knocked out the stones, and returned the plaintiff the setting, refusing to give him back the stones. In trover for the value of the stones, Pratt, C. J., directed the Jury, that unless the defendant would produce the stones, so as to show that they were not of the finest water, they ought to presume against him, and make the value of the best jewels that would fit that setting the measure of their damages.

DODWELL v. GIBBS, Gent., One, &c.

In an action for mesne profits, the judgment in ejectment is conclusive of the plaintiff's right to the premises, from the day of the demise laid in the declaration in ejectment, but is no proof of the defendant's possession at that time. The consent rule admits the possession at the time of the service of the declaration in ejectment; but if the plaintiff intends to go for mesne profits antecedent to that time, he must give distinct evidence of the defendant's possession.

TRESPASS for mesne profits. Plea—General Issue.

An examined copy of the judgment in ejectment was put in. The demise was laid in 1824; but it appeared that the declaration in ejectment was not served till *Michaelmas* Term, 1825.

Curvood, for the defendant, objected, that upon this evidence mesne profits could be recovered only from Michaelmas Term, 1825. For although the plaintiff's title to recover could not be controverted, yet the defendant, by the consent rule, only admitted himself in possession from the time of the service of the declaration in ejectment; and although the plaintiff might have an antecedent right to the premises in question, yet it did not follow that the defendant was in possession at an earlier period; and therefore, to entitle the plaintiff to recover mesne profits antecedent to the service of the declaration in ejectment,

distinct evidence must be given that the defendant was in possession before that time.

Jervis, contra, insisted that the judgment in ejectment was conclusive of the plaintiff's title to recover mesne *profits from the day of the demise laid [18]

in the declaration, and cited Aslin v. Parkin, 2 Burr. 665.

Curwood, in reply. It is true that the judgment in ejectment is conclusive of the plaintiff's title to recover mesne profits from the day of the demise; but it is not conclusive of his right to recover the whole amount against the defendant. In the cose of Aslin v. Parkin, Lord Mansfield says, 2 Burr. 668, that the judgment in ejectment is no evidence of how long the defendant has occupied, but that that fact must be proved by other evidence.

GARROW, B. I am of opinion that the plaintiff can, on this evidence, only

recover from the time of the service of the declaration in ejectment.

Verdict for the plaintiff—Damages from the time of the service of the declaration in ejectment.

Jervis, and Talfourd, for the plaintiff. Curwood, and Russell, for the defendant.

[Attornies-Ward, and Gibbs.]

HEALEY v. JACOBS.

What is said by a third party at the time of the signing of a promissory note, as to the consideration for which it is given, is not evidence against the payee, if he was not present.

Assumes to the plaintiff as payee, against the defendant as the maker of a promissory note for 34l., dated on the 24th of October, 1825, and payable six

months after date. The plaintiff relied on the formal proofs.

The defence opened was, that the defendant, who had failed in business, had made a composition with his creditors; and that a person named *Plumridge*, being a creditor, would not sign the deed of composition, unless this note was given to the plaintiff, to whom *Plumridge* owed money; *and that this was stated at the time of the signing of the note.

To prove this, a witness was called, who was present when the note was signed. He stated, that the plaintiff was not present, but the defendant's counsel wished to get from him, that at the time of the signing of the note, Plumridge said that he would not execute the composition deed, unless this note was

given to Mr. Healey.

Peake, Serjt., objected that what Plumridge said, was not admissible in evi-

dence to prejudice the plaintiff, unless he were present.

Curwood, and Carrington, contra. The plaintiff is one of the original parties to the note, and therefore, as against him, what passed at the time of the

making of the note is evidence.

GARROW, B. This evidence, if admissible, would be of the most dangerous description. The defendant is making a note payable to the plaintiff, at a time when the plaintiff is not present. Now I am asked to receive evidence of a conversation between the defendant and a third person, the plaintiff not being present. I am clearly of opinion that I cannot, and ought not to do so. What would be so easy as for a man, when he signed a promissory note, either to say, or to get somebody else to say, in the absence of the payee, that it was

given without a consideration, or for an illegal consideration. It would be very hard if the payee were bound by that. The evidence is inadmissible.

Verdict for the plaintiff—Damages, 341. 14s.

Peake, Serit., and Cross, for the plaintiff. Curwood, and Carrington, for the defendant.

[Attornies—Smith, and E. Isaacs.]

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*COURT OF KING'S BENCH.

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, AND LITTLEDALE, JS.

In Banc.

Curvood now moved for a rule to show cause why there should not be a new trial, on the ground that the evidence had been improperly rejected.

BAYLEY, J. If it had been admitted, you would have given a declaration of Plumridge, not upon oath, in evidence against the plaintiff. If you had wanted to show that the note was given, because Plumridge would not execute the deed without it, you could have called him as a witness to prove the fact.

Lord TENTERDEN, C. J. We are of opinion, that the evidence was not admissible.

Rule refused.

OXFORD ASSIZES.

BEFORE MR. BARON VAUGHAN.

WELLER v. DEAKINS.

If to qualify a horse to start for a certain stake, it should have been regularly hunted with

the duality a noise to start for a certain stake, it should have been regularly hunted with the hounds of A. B. It is not necessary that the horse should have been hunted every day the hounds went out; but once hunting with those hounds is not sufficient.

If a race be advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions, without the consent of the whole of the subscribers. If the plaintiff's horse was disqualified, as not coming within the description of horses that were to run, he cannot recover back his original share of the stake, if he was aware of the disqualification, and was guilty of a misrepresentation.

Money had and received. The defendant was the clerk of the course at the Mostyn-hunt Races; and the plaintiff sued him as a stake-holder, for the amount of stakes held by him on a race won by a mare of the plaintiff's called Funny.

*The printed proposal of the race which had been advertised, was in *619] the following terms:—

"A sweepstakes of ten guineas each, five forfeit, for horses not thorough

bred that have never started against a thorough bred one, or run for a plate: that have been regularly hunted with Sir Thomas Mostyn's, the Duke of Beaufort's or the Duke of Grafton's hounds, up to the day of naming, and are bona fide the property of the subscriber. The winner of any race to carry 7lb. extra; 4-year olds, 11st. 5lb.; 5-year olds, 11st. 12lb.; 6-year old and aged, 12st. 2lb.; to be ridden by gentlemen twice round the course.—One guinea entrance. Horses to be named to Mr. E. Deakins on or before the 22d of March."

It was proved that the plaintiff paid his share of the stake, and that his mare came in first; but it appeared, that the mare had been only once hunted with

the hounds of Sir Thomas Mostyn.

VAUGHAN, B. I apprehend that it cannot be necessary to qualify a horse to run for this stake, that he should have hunted every day the hounds went out. I think it would be sufficient to show that the horse hunted frequently: but I am decidedly of opinion, that once hunting is not enough.

A witness proved, that about a half an hour before the race was run, the plaintiff said to the defendant, that he hoped he was satisfied about the mare's hunting; and that the defendant replied, "Quite so; you run your mare, we

have arranged that."

VAUGHAN, B. It must be shown that the clerk of the course had authority from the other subscribers to waive the conditions of the race. It is not enough for the clerk of the course to say, half an hour before the running, that *he would waive a particular condition; take it, that there was a printed proposal to run horses on certain terms, what the clerk said after this was published, cannot have the effect of waiving any of those terms, without all the other subscribers are proved to have consented to it.

The plaintiff's counsel then contended, that as the plaintiff's mare could never win the race, the plaintiff was entitled to have his own share of the stake back again, the same as a party who insured a ship, where the risk was

never run.

For the defendant it was proved, that under the name of Flashy Molly, the plaintiff's mare, that was now entered by the name of Funny, had won many

races, had started against thorough bred horses, and run for plates.

VAUGHAN, B., (to the Jury.) It will be for you to say, whether the plaintiff has been guilty of an attempt to impose on the other subscribers to the race, by a misrepresentation of his mare; for if so, he will not be entitled to recover back any share of the stake. If the plaintiff knew of the disqualification of his mare, the law will not assist him in the recovery of his deposit.

Verdict for the defendant.

Peake, Serjt., and Curwood, for the plaintiff. Jervis, and M. Mahon, for the defendant.

[Attornies—Morrell, and Halloway.]

*HEREFORD ASSIZES.

BEFORE MR. SERJEANT BOSANQUET.+

HAYNES v. HAYTON, Esq.

If a recognizance be estreated at the quarter sessions, and a writ issue to the sheriff to levy under the stat. 3 Geo. 4, c. 46, and the sheriff levy the amount; the Court of Quarter Sessions have the power to mitigate the amount, although the money has been actually levied, and the sheriff must pay back the difference to the party. Whether on such a levy the sheriff is entitled to poundage—Quare.

Money had and received. Plea—General issue. It appeared that the plaintiff and his wife, and others, had been indicted at the Eastern Quarter Sessions, at Hereford, in the year 1824, for a forcible entry; and the plaintiff entered into the usual recognizances for himself and his wife; and that after the first day of the Sessions, a writ of certiorari had been obtained at the instance of the defendants. At the next Sessions the plaintiff's recognizances were estreated, but on the trial of the indictment before Mr. Justice Lattledale, at the Lent Assizes of 1825, the plaintiff and the other parties indicted, were all acquitted. The clerk of the peace of the county of Hereford, on the 25th of August, made out a list of fines and forfeited recognizances, under the stat. 3 Geo. 4, c. 46, and a writ issued to the defendant, as sheriff of that county, (as directed by that statute,) which writ was in the following form:

"George the fourth, &c. To the Sheriff for the county of Hereford, greeting.

"You are hereby required and commanded, as you regard yourself and all yours, that you omit not by reason of any liberty in your county, city, borough or place, as the case may be, but that you enter the same, and of all the goods and chattels, lands and tenements of all and singular the persons in the several extracts of this writ annexed, you cause to be levied all and singular the debts and sums of money upon them in the same extracts severally imposed and charged, so that the money may be ready for payment at the next general or quarter sessions of the peace, to be paid over in such manner as any two or more of the Lords Commissioners of his Majesty's treasury may direct; and if any of the said several debts cannot be levied by reason of no goods or chattels being to be found belonging to the parties, then in all cases that you take the bodies of the parties refusing to pay the aforesaid debts, and lodge them in the jail of the said county, there to await the decision of the justices assembled at the next general or quarter sessions, unless the parties shall have given sufficient security for their appearance at such sessions, for which you will be held answerable; and have you there then this writ. Witness, &c."

Under this writ the defendant, as sheriff, seized the goods of the plaintiff, and having refused to take a security, the plaintiff paid into his hands the amount of the recognizances. At the October Sessions, a motion was made to discharge the recognizances, and it was ordered by the Court of Quarter Sessions, "that these recognizances be mitigated to 13s. 4d. each, and that the clerk of the peace do make out the necessary orders for discharging the sheriff, on passing his accounts for the sum of 39l. 6s. 8d. on account of these recognizances.

[†] Mr. Baron Garrow, having been obliged to leave Shrewsbury, from an attack of the gont, Mr. Serjeant Bosanquet sat for his Lordship during the remainder of the Circuit.

nizances." And a similar order of sessions was made in respect of the recog-

nizance entered into for the plaintiff's wife.

It was proved by the clerk of the peace, that he duly transmitted the orders of sessions to the defendant's under-sheriff; and a clerk from the Pipe Office of the Exchequer produced the sheriff's accounts of fines and recognizances, from which it appeared that the sheriff had been discharged from the amount of these recognizances with the exception of 13s. 4d. on each.

Taunton, for the defendant. The question in this case is, whether after the money was levied, the Sessions had any power to order the recognizances to be discharged. *I submit that they can, under the act of Parliament, only make orders where the party is in custody, or out on bail. There is in the 2d section of the stat. 3 Geo. 4, c. 46, a reference to the schedules; and, from the form of the writ, I contend that although the Sessions may discharge a recognizance before the amount of it is levied; yet, that it has no such power after the execution is executed, and that as soon as the money is actually levied, it belongs to his Majesty, and must be paid as directed by the Lords Commissioners of his Majesty's Treasury.

Bosanquet, Serjt. I think that the plaintiff is entitled to recover; and I am of opinion that the Sessions had jurisdiction to order what they have done. That part of the 6th section which speaks of a sum of money paid in satisfaction of

a forfeited recognizance, appears to me to apply exactly to this case.†

*Taunton. I submit, that as the sheriff actually levied, he is entitled

to deduct his poundage.

BOSANQUET, Serjt. I should recommend the plaintiff to allow the poundage to be deducted, as it may save a motion for a new trial.

Verdict for the plaintiff, allowing the sheriff's poundage.

Maule, and Whitcombe, for the plaintiff.

Taunton, for the defendant.

[Attornies—Parsons, and Harris.]

† By the stat. 3 Geo. 4, c. 46, s. 6, it is enacted, "That the court of general or quarter sessions before whom any person so committed to jail or bound to appear shall be brought, is hereby authorized and required to inquire into the circumstances of the case, and shall at his discretion, be empowered to order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, or any part thereof; and such order shall be made in the form or to the effect of the schedule marked (C) to this act annexed, and shall be signed by the clerk of the peace; which said order shall be a discharge to such sheriff, bailiff or officer, on the passing of his accounts at the Exchequer, or before any auditor or other proper officer duly authorized to pass the same; and in all cases where the party shall have been lodged in the common jail by such sheriff, bailiff or other officer, the justices of the peace so assembled are hereby empowered either to remand such party to the custody of the sheriff, bailiff or other officer, or upon the release of such party from the whole of such forfeited recognizance, to order such party to be discharged from custody; and such order shall be a full and sufficient discharge to the said sheriff, bailiff or officer on the passing of his accounts at the Exchequer or before any auditor or other proper officer duly authorized to pass the same; and it shall and may be lawful to and for the said court of general or quarter sessions to award such costs, charges and expenses to be paid by either party to the other, as to the said court shall seem just and reasonable."

REED v. DEERE, Gent., One, &c.

If parties enter into a written agreement, which is duly stamped, and indorse terms on the back of it varying the original agreement, such new terms will not be admissible in evidence without a fresh stamp; and the indorsement of such terms must be considered as putting an end to the original agreement; and therefore the plaintiff cannot recover upon either, but must be nonsuited.

Assumpsit. The declaration stated, that, in consideration that the plaintiff would forbear to enter two causes for trial at the Hereford Summer Assizes, 1825, &c., the defendant undertook, &c., to abide by, perform, &c., the award of Ebenezer Ludlow, Esq. The plaintiff averred performance of his part of the contract, and stated, that the defendant, not regarding, &c., wrongfully revoked the authority of the arbitrator. There were several special counts in the declaration framed on the two agreements to refer, which are hereinafter set forth. Plea—General issue.

It was proved, that two actions had been commenced by the plaintiff against the defendant, in which notice of trial had been given for the Hereford Summer Assizes, 1825, and that previous to that Assize the plaintiff's attorney received the following letter from the defendant.

"27th July, 1825.

"Myself ats. Reed.
"Deere and Cooke ats. Reed.

"Sir,—You stated in your former letter, that by referring these actions a considerable expense would be saved; *and, in order to do that, I consented to refer to Mr. Ludlow, as you proposed. I am, therefore, surprised to find by your letter, received this morning, that you intend to enter the causes for trial, by which you will incur a very heavy expense, and oblige me to go to the Assizes; all of which appears to me to be quite unnecessary, because the reference might be made a rule of Court, in the usual way, without all that expense. The costs should be in the discretion of the arbitrator. I consent to the causes being referred to Mr. Ludlow, on the usual terms, and the costs to be in his discretion, and the reference to be made a rule of Court in the usual manner, which will bind us both; but you are determined to incur all the expense of entering the causes for trial. I shall go before a Jury. Your reply, instanter, addressed to me, at the post office, Bristol, will decide. I am yours, &c.

"John Deere.

"To Mr. Thomas Stokes."

To this letter, by return of post, the plaintiff's attorney sent the following answer:-

"Reed, Esq. v. Deere, Gent." Same v. Same, and Cooke.

"I have your letter, and in consequence shall not enter the causes as you wish, but leave them both to the determination of Mr. Ludlow, although I am fully satisfied that the step I proposed would have been the better way for all parties. I am your obedient,

"Thomas Stokes.

"Bristol, 29th July, 1825."

The first of these letters was stamped about ten days after its date. Mr. Ludlow, after giving several appointments, which were not attended, gave another appointment for the 24th of October, 1825, which was attended by alimeters; but before any witness was examined, the *following indorsement was made on the back of the first letter—

"The within written agreement having been read over and considered by us

the undersigned, it is understood and agreed, that all costs are to be in the arbitrator's discretion, and that the parties agree to abide by the arbitrator's decision touching the subject matter of the said two actions, and what he shall see fit to be done by the said parties thereto respectively, so that his award be made and ready to be delivered to the party requiring the same, on or before the first day of Michaelmas Term next, or such further day not exceeding the first day of Hilary Term, as the said arbitrator may appoint.

"Witness our hands, the 24th day of October, 1825. The submission to

be made a rule of Court.

"Thomas Stokes, atty. for the plt.
"John Deere for self and Cooks, se
far as the same shall be proved to
be a partnership transaction."

This indorsement was not stamped.

Campbell, and Maule, for the defendant, objected, that this indorsement on the agreement was not admissible in evidence for want of a stamp, as the virtue of the first stamp was exhausted by the first agreement, and the indorse-

ment, as a new agreement, required a new stamp.

Russell, and Whitcombe, contra. The first letter, which is stamped, and this indorsement on it, altogether make but one agreement; and the new terms being added while the whole was in *fieri*, the whole requires but one stamp; and it is like the case of a mistake in a promissory note, which, if altered before it is issued, does not require a new stamp.

Campbell. The original stamp was imposed when "there was a perfect agreement; and then the question is, whether the indorsement makes any material alteration in that agreement; for if it does, a new stamp becomes necessary. There is, by the first agreement, an unlimited time for Mr. Ludlow to make his award. By the indorsement, he is limited to a particular time. Again, by the original agreement, he is confined to the "usual terms;" by the indorsement he may direct what shall be done by the parties, which is not a usual term. If this indorsement had been written on a separate paper, there is no doubt that it must have had a stamp. It should also not be forgotten, that the original agreement was acted upon. Mr. Ludlow took upon himself the burden of the arbitration in pursuance of it, by appointing a meeting, and causing all the parties to assemble. I therefore submit that the indorsement is not admissible in evidence for want of a stamp.

BOSANQUET, Serjt. The question is, whether this indorsement varies the original terms. I think it does, and that it is therefore inadmissible for want

of a stamp.

The indorsement being held to be not admissible in evidence, the plaintiff's counsel wished to go upon the original agreement, as some of the counts of the declaration were framed upon that only.

Campbell, for the defendant. I submit, that if there was a new agreement entered into, that absorbs the older agreement; and the plaintiff must be called,

as he cannot go on the last agreement for want of a stamp.

Bosanquet, Serjt. This objection is one of a very strict nature; but I am bound to say, that the new agreement indorsed contains terms different from the former agreement contained in the letter, as it limits the time for making the award, and allows the arbitrator to direct what shall be done between the parties. I certainly think, *that it appears that the original stamped agreement was departed from; and as the plaintiff is not in a condition to give legal proof of the subsequent agreement, he must be called.

Nonsmit

Russell, and Whitcombe, for the plaintiff. Campbell, and Maule, for the defendant.

(Crown Side.)

BEFORE MR BARON VAUGHAN.

REX v. JAMES LEWIS and WILLIAM LEWIS.

If there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary.

The prisoners were indicted for a burglary in the house of John Verry, and stealing money, &c. The house had been secured on the night before, and the thieves entered through a cellar window; this window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar; and through this aperture one of the prisoners thrust his head, and by the assistance of the other he thus entered the house. The prisoners did not enlarge the aperture at all.

Justice, for the prisoners, contended that this was an open window; and,

therefore, it was no burglary to enter at it.

Curvood, contra, submitted that this aperture came within the same reasoning as the cases of burglary, where the thief came down a chimney, because it was as much closed as the nature of it would admit.

*629] VAUGHAN, B. Do you think that if a person leaves a *hole in the side of his house big enough for a man to walk in, a person entering at it with intent to steal goods would be guilty of a burglary? I think not, and I am of opinion that this is not a burglary.

The Jury, under his Lordship's direction, acquitted the

prisoners of the burglary.

Curwood, for the prosecution. Justice, for the prisoners.

[Attornies-Gough, and Watkins.]

MONMOUTH ASSIZES.

BEFORE MR SERJEANT BOSANQUET.

REX v. SARAH JONES and MARY JONES.

If the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt; the Judge will leave the whole of the conflicting statements to the Jury for their consideration: but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the Judge will direct an acquittal.

THE prisoners were indicted for the wilful murder of the new born female child of the prisoner Sarah Jones.

The evidence against the prisoner Sarah Jones was, the finding of two cuts across the throat of the child, which the surgeons were of opinion must have been inflicted while the child was alive; and a confession of Sarah Jones that she had cut its throat. However, some of the witnesses for the prosecution stated in their examination in chief, that she had told them that the child was still born.

Carrington, for the prisoners, submitted that although, in general, the declaration of a party was not evidence in favor of the party making it, yet if the prosecutors chose to make such declarations evidence, they must take them for good or for bad. Here the prosecutors had adduced in evidence, a declaration of the prisoner, that the child was still born, and having done so, they had made it evidence, and must take the statements it contained to be true. And he cited a case tried before Mr. Baron Garrow, "where a prisoner was indicted for a larceny, and in addition to evidence of the possession of the stolen goods, the counsel for the prosecution put in the prisoner's statement made before the magistrate, in which the prisoner asserted that he had bought the goods. The learned Baron directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together.

Bosanquet, Serjt. If this case had been similar to the case cited, I should hold precisely the same as the learned Baron did in that case. There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the Jury, for their consideration, precisely as in any other case, where one

part of the evidence is contradictory to another.

The learned Serjeant left the whole of the evidence to the Jury, who found Sarah Jones, Guilty.—Mary Jones, Not Guilty.

Russell, and Talfourd, for the prosecution. Carrington, for the prisoners.

[Attornies-Prothero & P., and ----.]

*GLOUCESTER ASSIZES.

[*23]

(Civil Side.)

REFORE MR. SERJEANT BOSANQUET.

GOUGH v. FARR.

To support an action for a breach of promise of marriage, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff, and a refusal by the defendant. But if the plaintiff's father go to the defendant, and ask him if he means to fulfil his engagements to his daughter, and he reply, "Certainly not;" proof of this will be sufficient."

Breach of promise of marriage. The declaration contained the three usual counts:—To marry in a reasonable time;—to marry on request;—and to

marry generally. Plea-General issue.

It was proved by the Rev. H. Gough, the brother of the plaintiff, that the defendant, on his asking him what were his intentions towards his sister, said, that he meant to marry her, and that he should wish him to perform the cere mony at his church. The defendant had not married any other person. To show a breach of the promise, it was proved, that the father of the plaintiff went to the defendant, and asked him if he meant to perform his engagements with

his daughter, and the defendant replied,—"Certainly not."

Ludlow, for the defendant. I submit that this is not sufficient evidence of a breach of the contract. A promise to marry is in point of law exactly like any other contract; and the plaintiff must show not only that the defendant did not, and perhaps would not marry her, but also that she was willing, and tendered herself to marry him. Now, of this there is not the slightest proof. In ordinary cases, this proof is rendered unnecessary by the defendant's having put it out of his power to marry the plaintiff, by having married another. In the present case, the defendant was as much in a condition to marry the plaintiff as he ever was; and non constat if she had tendered herself to him, that he would not have fulfilled his engagement by marrying her. With regard to the conversation *with her father, that does not help the case: because that, at most, can only show what the defendant's intentions at that time might be, as he had had no opportunity offered him of actually fulfilling his contract. I therefore submit, that there must either be a distinct opportunity given to the defendant to fulfil his engagement, by a tender on the part of the plaintiff; or the necessity of this must be dispensed with, by the defendant's having married another.

BOSANQUET, Serjt. This point is, I believe, new. I shall not stop the

cause on it, but give Mr. Ludlow leave to move to enter a nonsuit.

Verdict for the plaintiff—Damages 2501.

C. Phillips, and Philpotts, for the plaintiff. Ludlow, and Cross, for the defendant.

[Attornies—Stone & S., and Bevan & B.]

In the ensuing Term, Ludlow moved to enter a nonsuit: but the Court of Exchequer held, that although, in cases where the defendant had not married another, there ought to be proof of a tender and refusal; yet that what occurred between the defendant and the plaintiff's father was sufficient evidence of those facts: and their Lordships, therefore, refused the rule on that ground, but granted a rule nisi for a new trial for excess of damages.

See the cases of Daniel v. Bowles, ante, 553; Irving v. Greenwood, ante, Vol. 1, 350; Wharton v. Lewis, Id. 529; and Foots v. Hayne, Id. 545.

(Crown Side.)

BEFORE MR. BARON VAUGHAN.

REX v. THOMAS SMITH.

Forgery. If a second uttering be made the subject of a distinct indictment, it cannot be given in evidence, to show a guilty knowledge in a former uttering.

THE prisoner was indicted for uttering a forged one pound Bank of England note, to Anne Hayward, knowing the same to be forged.

There was a second indictment against the prisoner for uttering another

forged one pound note to Emma Hobbs.

On the trial of the first indictment, Twiss, for the prosecution, to show that the prisoner knew the note paid to Mrs. Hayward to be forged, wished to give evidence of the other uttering to Emma Hobbs.

evidence of the other uttering to Emma Hobbs.

Justice, for the prisoner. I submit this cannot be done; it is contrary to every principle of English law. It is an endeavor to prove a man guilty of one offence, by showing him guilty of another. That uttering being the sub-

ject of another indictment, we can hear nothing of it on this.

VAUGHAN, B. I think, as the second uttering is made the subject of a distinct prosecution, we are not at liberty to go into evidence of it, even to show a guilty knowledge in a previous uttering. Other utterings, for which no prosecution had been commenced, have been held to be evidence to show a guilty knowledge. But even that was much questioned by many able lawyers; and I am of opinion, that if the prosecutors have made the second uttering the subject of a substantive charge, I cannot receive evidence of it in support of the present indictment.

Verdict-Not Guilty.

Twiss, for the prosecution. Justice, for the prisoner.

*OLD BAILEY SESSION, 1827.

F*634

BEFORE MR. JUSTICE BURROUGH, AND MR. JUSTICE LITTLEDALE, AND NEWMAN KNOWLYS, ESQ., RECORDER.

REX v. WILLIAM SHEEN.

If, in a plea of autrefois acquit, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But semble, that if he insisted on the wrong, the Court would, in a capital case, take care that he did not suffer by it.

If the prisoner could have been legally convicted on the first indictment, upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not.

INDICTMENT for murder. The first count charged the prisoner with making an assault in and upon "a certain male child of tender age, that is to say,

about the age of four months, baptized by the name of Charles William," and murdering him by cutting off his head with a knife. The second count described the child in the same way, except that it stated the child to be " a male bastard child," instead of a male child simply. The third count stated the deceased to be "a certain male bastard child of tender age, that is to say, about the age of four months, called and known by the name of Charles William." The fourth count was exactly similar to the third, except that for the name Charles William the name of William was substituted. The fifth count was similar to the third, except that for the name Charles William the name of Billy was substituted. The sixth count was also like the third, except that the name of Charles was substituted for Charles William. The seventh, eighth, ninth and tenth counts were like the third, fourth, fifth, and sixth respectively, except that they omitted the word bastard, and called the deceased a a certain male child," &c. The eleventh count was for the murder of a certain male child, &c., (as before,) "called and known by the name of Charles Sheen." The twelfth count also described the deceased as a certain male child, &c., (as before,) "whose name to the jurors aforesaid is unknown." The thirteenth count was exactly similar to the twelfth, except that there was the addition of the word bastard.†

*On being called upon to plead to this indictment, the prisoner put in the following plea, which was engrossed on parchment:—

"And the said William Sheen, the younger, being brought to the bar of this Court, and having heard the said indictment read, and the matters therein contained, says, that he ought not to be put to answer the said indictment, he having been heretofore, in due manner of law, acquitted of the premises in and by the said indictment above specified and charged upon him; and for plea to the said indictment, he says, that heretofore, to wit, at the delivery of the King's jail of Newgate, holden, &c., [it here set forth the caption of the Session verbatim, he the said William Sheen, the younger, was duly arraigned upon a certain indictment, which charged him, the said William Sheen, the younger, by the name and description of William Sheen, the younger, late of the parish of Saint Mary Matfelon, otherwise Whitechapel, in the county of Middlesex, laborer; not having the fear, &c., [it here set out the former indictment verbatim, concluding with the words, 'his crown and dignity,'] to which said last mentioned indictment, he did then and there plead not guilty, and thereupon a Jury then and there duly summoned, impannelled, and sworn to try the said issue, so joined between our sovereign lord the King and the said William Sheen, the younger; upon their oaths did say, that the said William Sheen, the younger, was not guilty of the said felony *and murder, by the said *636] the younger, was not guilly indicated the younger, which is charge; where younger, there considered by the said Court, that the said William Sheen, the younger, should go thereof acquitted without day, as appears by the record of the said proceedings now here remaining in Court. And the said William Sheen, the younger, avers, that the said William Sheen, the younger, mentioned in the former indictment, and he, the said William Sheen, the younger, who is charged by this present indictment, are one and the same person, and not divers and different persons, and that the said infant mentioned in the said first indictment, and the male child in this present indictment mentioned, are one

[†] From the authorities cited in 2 Curw. Hawk. 319, it appears that persons other than the defendant or prisoner must be described "with convenient certainty, which will hardly be dispensed with except in special cases, and for special reasons." This description is ordinarily the christian and surname of the person. However, in a case like the present it might have been better, as there was no surname given to the child, to have described him, for greater certainty, as "a certain male child, &c., born of the body of Lydia Beadle."

t In that indictment the deceased was described as "Charles William Beadle, an infant of tender age, that is to say, about the age of four months;" in other respects it was exactly similar to the present indictment.

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and the same male child, and not divers and different children; and the said William Sheen, the younger, further avers that the felony and murder in the said former mentioned indictment mentioned, and the felony and murder in this present indictment mentioned, are one and the same felony and murder, and not divers and different felonies and murders. And the said William Sheen, the younger, further avers that the said male child, described by the name of Charles William Beadle in the said former indictment mentioned, was as well known by the said name of Charles William Beadle, as by any of the several names and descriptions of Charles William, William, Billy, Charles, or William Sheen, or a certain male child, or a certain male bastard child, as he is in and by the present indictment described; and this he is ready to verify. Wherefore he, the said William Sheen, the younger, prays the judgment of the Court here, if he ought to be put further to answer this present indictment. And whether our said lord the King will or ought further to prosecute or impeach him, the said William Sheen, the younger, on account of the premises in this present indictment contained. And that he may be dismissed the Court and go without day. Robt. Nathaniel Cresswell."

To this plea Curwood, for the prosecution, replied ore *tenus as follows: (which he read from a note on the back of his brief.)

"And Thomas Shelton, Esquire, who, for our said Lord the King, prosecutes on this behalf, says, that our said Lord the King ought not to be barred from further prosecuting the said indictment, because he saith, that the said William Sheen, the younger, was not heretofore acquitted of the premises, charged in and upon him by this present indictment; for although true it is, that the said William Sheen, the younger, was acquitted upon the said indictment in his said plea mentioned, and although true it is, that the said infant in the said former indictment mentioned, and the male child in this present indictment mentioned, is the same child, and not another and different child; yet for replication in this behalf, he says, that the said male child was not known as well by the name of Charles William Beadle, as by any or either of the several names by which he is named in the present indictment; and this the said Thomas Shelton, Esq., on behalf of our said Lord the King, prays, may be inquired of by the country.

R. N. Cresswell, for the prisoner, then said—"And the said William Shem,

the younger, doth the like."

The prisoner's counsel asked if they might add to this plea, that the prisoner was also acquitted on the coroner's inquisition, in which the deceased was described as Charles William Sheen.†

*Burrough, J. If the prisoner by his plea insists on two records, [*638 his plea would be double; but if in the course of the case it shall appear that he ought to have pleaded his acquittal on the inquisition, I will take care that he shall not be prejudiced.

The Court awarded a venire returnable instanter—And the sheriff having

made his return forthwith, and the Jury having been sworn-

R. N. Cresswell, for the prisoner, opened his case to the Jury in support of the plea, and put in an examined copy of the register of baptisms of the parish of St. George the Martyr, Southwark, in which the baptism of the deceased was entered "Charles William, the son of Lydia Readle," &c.

[†] This plea had been prepared by the prisoner's counsel. The inquisition had charged the prisoner by the name of William Sheen, with the murder of "Charles William Sheen." by cutting his throat with a razor. This plea commenced and stated the caption of the session, in precisely the same terms as the foregoing plea, and set forth the caption of the inquisition, and the whole of the inquisition to the end; and then continued, "and the said William Sheen, the younger, therein called William Sheen, did then and there plead not guilty;" and the plea then went on in the same terms as the other plea to the end; sub attuting "inquisition," for "former indictment," and the name of "Charles William Sheen for "Charles William Beadle," and averring the identity of William Sheen, and William Sheen, the younger.

A witness was called, who proved the identity of the child, whose mother was an unmarried woman, named Lydia Beadle; whom the prisoner had married after the birth of the deceased. This witness stated, that the deceased infant was always called William or Billy, but that she should have known him by the name of Charles William Beadle; and if any one had inquired for him by that name, she would have known who was meant. And the prisoner's father stated, that the child's name was Charles William Sheen, but that he had never heard him called so.

Andrews, Serjt., addressed the Jury, on the part of the prosecution. He cited the case of Rex v. Clarke, and called two witnesses, one of whom had been told by the mother of the deceased that his name was William. and *the other had never heard the deceased called either, or spoken of by •639] any name at all.

Clarkson, for the prisoner, replied.

BURROUGH, J., (in summing up)—The question in this issue is, whether the deceased was as well known by the name of Charles William Beadle, as by any of the names and descriptions in the present indictment; and I ought to say, that if the prisoner could have been convicted on the former indictment he must be acquitted now: And whether at the former trial the proper evidence was adduced before the Jury or not, is immaterial; for if by any possible evidence that could have been produced, he could have been convicted on that indictment, he is now entitled to be acquitted.

The first evidence we have is the register; and, looking at that, would not every one have called the child Charles William Beadle? and it is proved by one of the witnesses that she should have known him by that name. It cannot be necessary that all the world should know the child by that name, because children of so tender an age are hardly known at all, and are generally called by a christian name only. If, however, you should think that the name of the deceased was Charles William Sheen, I wish you would inform me of it by your verdict; because it is agreed, that, as that is the name in the Coroner's inquisition, the prisoner should derive the same advantage from the course he has taken, as if he had pleaded his acquittal in that inquisition. My brother LITTLEDALE suggests to me, that if a legacy had been left to this child by the name of Charles William Beadle, he would have taken it upon this evidence; *640] and if this evidence of the child's name had *been given at the former trial, I think the prisoner should have been convicted. The case of Rex v. Clarke has been cited; but in that case there was an entire absence of evidence as to the surname of the deceased. If you think that in the present case the name of the deceased was either Charles William Beadle or Charles William Sheen, or if you think that he was known at all by those names, or either of those names, you ought to find a verdict for the prisoner.

The Jury found, that the deceased was as well known by the name of Charles William Beadle, as by any of the other names.

BURROUGH, J. There must be judgment for the prisoner. We are obliged to Mr. Cresswell for drawing that plea: it was very properly done.

Andrews, Serjt., and Curwood, for the prosecution. R. N. Cresswell, and Clarkson, for the prisoner.

[Attornies—Martin, H. & S., and —

† Russ. & Ry. 358, and Car. Suppl. 41. That case decides that in an indictment for the murder of a bastard child, the deceased ought not to be described by its mother's surname,

unless it has gained that name by reputation.

‡ Although the junior counsel, he replied, by leave of the Court, on the ground that he had been counsel at the former trial.

§ A successful plea of autrefois acquit being very unusual in practice, it was thought right to give a report of this case, although it does not strictly come within the plan of this work. For the law on the subject of pleas of autrefois acquit, see 2 Curw. Hawk. ch. 35, p. 515; 1 Stark. 316; Arch. Cr. L. 53.

*PROMOTIONS.

1827.

In the Vacation after Hilary Term, John Vaughan, Esq., his Majesty's Ancient Serjeant, was appointed one of the Barons of the Court of Exchequer, vice Sir Robert Graham, Knt., resigned.

In the same Vacation, Sir John Singleton Copley, Knt., was created a Peer, by the title of Lord Lyndhurst, and was appointed Lord High Chancellor of

England, vice John, Earl of Eldon, resigned:

The Right Hon. Sir Charles Abbott, Knt., was also created a Peer, by the

title of Lord Tenterden:

James Scarlett, Esq., one of his Majesty's counsel, was appointed his Majesty's Attorney General, vice Sir C. Wetherell, Knt., resigned, and received the honor of Knighthood:

Sir Nicholas Conyngham Tindal, Knt., his Majesty's Solicitor General,

received a patent of precedence:

And John Bernard Bosanquet, Esq., Serjeant at Law, was appointed to be

one of his Majesty's Serjeants learned in the Law.

In Easter Term, Sir John Leach was appointed Master of the Rolls, vice

Sir J. S. Copley, Knt.; and Sir Anthony Hart, Knt., was appointed Vice Chancellor, vice Sir John Leach, Knt.

*In the Vacation after Easter Term, Henry Brougham, Esq., received a patent of precedence; and T. C. Treslove, George Rose, and Henry Bickersteth, Esquires, were appointed his Majesty's Counsel learned in the Law.

In Trinity Term, William Taddy, John Cross, and Thomas Wilde, Esques, Serjeants at Law, were appointed his Majesty's Serjeants learned in the Law: John Williams, John Campbell, Frederick Pollock and Horace Twiss, Esquires, were appointed his Majesty's Counsel learned in the Law: and T. Andrews, Henry Storks, E. Ludlow, H. A. Merewether, W. O. Russell, E. Lawes, and D. F. Jones, Esquires, were called to the degree of Serjeant at Law; and a few days after, John Scriven, H. Stephen, and C. C. Bompas, Esquires, were also called to the degree of Serjeant at Law.

In the Vacation after Trinity Term, C. F. Williams, and W. Selwyn, Esqrs., and the Hon. T. Erskine, were appointed his Majesty's Counsel learned in

the Law.

ADDENDA.

COURT OF KING'S BENCH.

DEFORE ABBOTT, C. J., BAYLEY, AND HOLROYD, JS.;
In Banc.

DEAN v. BROWN, Esq., et al.

See ante, p. 62.

The motion for a new trial in this case now came on to be argued.

Searlett and Comyn showed cause, and contended, that whether the horse and chaise were, at the time of the making of the settlement, "articles belonging to Miss Tyler, in and about her business," was a question of fact; and that,

as such, it had been properly left to the Jury.

Gurney, and Holt, contra. The stock of feathers could not be put into the schedule, but the horse and chaise might be as easily inserted in it, as articles of furniture; a horse and chaise were not necessary to the trade of a plumassiere; and what is to pass under the words of a deed, is a question not of fact but of law; and even if it were a question for the Jury, it was clear, that if the horse and chaise had been intended to pass, they would have been specified.

horse and chaise had been intended to pass, they would have been specified.

Abborr, C. J. The horse and chaise are articles that may belong to any trade; and the Jury have found as a fact, that they did belong to Miss Tyler

in and about her business.

*Bayley, J. After the decided cases, it is impossible to question the validity of these deeds. The schedule only includes furniture, but the deed contemplates the stock, and things "in and about" the business. The question is, can a horse and chaise be used in such a business? That is a fact. In this case, they were used principally by the wife. If it had been proved that the wife had only occasionally used them for her trade, it might be different; but, on the evidence, the Jury have found that they were used by her in and about her business.

HOLROYD, J. I am of opinion that it was a question of fact.

Rule discharged.

† Mr. Justice Littledale was sitting in the Bail Court.

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BRYAN v. WAGSTAFFE.

See ante, p. 195.

THE Court, after hearing an argument, and taking time to consider of their judgment, made the rule absolute for reversing the judgment of outlawry.

PRINCE et al. v. LEWIS.

See ante, p. 66.

SEE ante, p. 00.

The rule for a new trial in this case now came on to be argued; and the Court concurring in the opinion given by the Lord Chief Justice at the trial, discharged the rule.

SKYRING v. GREENWOOD.

SEE ante, Vol. I. p. 517.

THE rule for a new trial in this case having been argued, the Court discharged it.†

*LLOYD v. ASHBY.

[*iii

SEE ante, p. 138.

THE points raised in this case have been turned into a special case, which has not yet been set down for argument.

DENN on the demise of BULKELEY v. WILFORD.

SEE ante, p. 173.

THE rule for a new trial in this case was never argued.

† See 6 Dow. & Ry. 401, S. C.

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COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, AND LITTLEDALE, J8.†

In Banc.

GOLDSTEIN v. FOSS et al.

See ante, p. 252.

THE rule for arresting the judgment in this case came on to be argued. Scarlett, for the plaintiff, submitted, that if there were one good count in the

declaration, that would be sufficient.

BAYLEY, J. No. As the judgment is entire, if any one count is defective,

the judgment must be arrested.

Scarlett then showed cause. The first count states that this was a society for the purpose of protecting persons in trade from swindlers and sharpers. That the plaintiff was concerned in trade, and that the defendant published that the plaintiff was unfit to be a member of that society; and on this, even if the words do not of themselves convey clearly the imputation that the plaintiff was a swindler and sharper, they are capable of being so explained by evidence; and the verdict for the plaintiff is conclusive that such evidence was adduced.

Brougham, on the same side. The inducement is sufficient, and the words "that the plaintiff is not considered fit to be ballotted for as a member," mean, that after an inquiry and an examination into his character, that is the result. The ordinary acceptation of the words clearly imports some blame, and if only a scintilla of blame attached, the count would be good after verdict.

Chitty, on the same side. A colloquium is unnecessary, when the words

Chitty, on the same side. A colloquium is unnecessary, when the words of necessity imply that the conversation related to the plaintiff's situation; Carn v. Osgood, 1 Lev. 280; and a count for saying that a man is a bankrupt,

is good without a colloquium of his trade.

BAYLEY, J. Because, unless he were a trader, he could not become

bankrupt.

Chitty. In the case of Coles v. Haveland, Cro. Eliz. 250, the words stated in the declaration were, that the plaintiff had strained a mare; and those words were, without a colloquium or introductory averment, held actionable, as words imputing unnatural practices; the Jury having found the innuendo which put that interpretation upon them.

Bolland, contra. If the words of themselves are not actionable, the innuendo cannot enlarge the meaning, without introductory matter, by way of inducement, or a colloquium. It is said, that the plaintiff is considered an improper person to be a member of this society. The same might be said of me, and the reason of that might be, that they never admitted lawyers to be

members of this society.

*Campbell, on the same side. These words are not actionable. But if they were, and the plaintiff has put an innuendo, which, for want of introductory matter, is not supportable, the count is bad. The innuendo says, that the defendants, by these words, mean that the plaintiff was a swindler and sharper, and evidence was given of that; and it being left to the Jury, they gave damages on that interpretation of the words. Now the plaintiff cannot, after this, say that the words meant less, nor put a more mitigated construction upon them. To extend the meaning of words, prefatory matter is necessary. Then, are the words actionable in themselves, rejecting the innuendo? Must

all men, except swindlers and sharpers, be of necessity fit and proper persons

to be members of this society? I say, certainly not.

ABBOTT, C. J. The first question is, whether the matter alleged to be libellous is connected with the introductory matter; if so, I should think the action maintainable. But here, I think they are not connected, and that the introductory matter stands quite alone. The count states, that the defendant published the alleged libel of and concerning the plaintiff in his trade; and the libel states the plaintiff to be unfit to belong to a certain society, and the pleader puts in an innuendo, that that means that he was a swindler and sharper. However, that by no means follows. Defects, far short of that, may conduce to that conclusion; and all this being entirely disconnected from the prefatory matter, we cannot say that any reflection at all is cast on the plaintiff. Private regulations may exist to exclude certain classes, or to make certain qualifica-

tions necessary, which the plaintiff may not possess.

BAYLEY, J. I think with my Lord C. J., but a Court of error may decide otherwise. Had it been averred, that the society had been in the habit of publishing the names of swindlers and sharpers, and had that averment been connected with the publication of the plaintiff's name in the *same manner, it might have supported the action; but here, the society, from which he is reputed to be excluded, is not averred to be the same society mentioned in the inducement. The use of the innuendo is to explain and connect the meaning with the prefatory matter, and so is most essential. Lord Mansfield says, Peake v. Oldham, Cowp. 277, that the words, "you are guilty of the death of Daniel Dolley, and rather than you should go without a hangman, I will hang you," plainly show what species of death was meant, and manifestly import a charge of murder; and in that case there was no inducement: but his Lordship adds, to say that a man is the cause of another's death, is widely different, for a physician may be the cause of a man's death, and very innocently so: but the saying that the party is guilty, and that he will hang him if necessary, clearly shows, in what sense the words were used. In the present case, there may be many innocent causes incapacitating the plaintiff from being a member of a particular society.

LITTLEDALE, J., concurred.

Rule absolute for arresting the judgment.

Being unavoidably absent when this case was argued, we are indebted for this note to the kindness of a friend at the bar.

BLOXAM et al., Assignees of FOUDRINIER et al., Bankrupts, v. ELSEE.

SEE ante, Vol. I. p. 558.

The counsel not being able to agree on a special case, the points raised by the defendant's counsel came on to be argued, on showing cause against the rule for a new trial.

Tindal, S. G., Marryat, Gurney, and Curwood, showed cause.† It has been objected that this patent is granted *for a machine, that will make paper of all widths, from one to twelve feet, but that no one machine, made according to the terms of the specification, will make paper of more than one

[†] All the points made on the motion for a new trial, were argued, but as the Court decided on only one of them, and gave no opinion as to the others, we have confined our report to that point only.

The patent is for the making of paper in sheets of from one to fortyfive feet in length, and from one to twelve feet in width; and, looking at the patent and the specification, it is clear, that the patent is granted for the new mode of making the paper, and not for the machine; the patent being not for a single machine, but for a mode of making paper. It is true, that the patent is for a machine for the making of paper, in single sheets, from one to twelve feet wide, and from one to forty-five feet and upwards in length. But, although one machine will make paper of one width only, yet you may have it of any width you please, by having your machine made of the size you want. Again, if the machine were made for twelve feet wide, it was proved by the mechanists at the trial, that, by slight alterations, which any man of skill would introduce, it might be narrowed to the smaller widths: indeed, the specification points this out; for it describes a cylinder as having grooves at the ends, which evidently regulate the width: therefore, it plainly appears, that, by these grooves being put nearer together or further asunder, you regulate the width of the paper.

Scarlett, contra. By the first patent it appears, that the inventor has represented to the Crown, "that he is in possession of a machine for making paper in single sheets without seam or joinings, from one to twelve feet and upwards wide, and from one to forty-five feet and upwards in length, the method of making which machine was communicated to him by a certain foreigner, with whom he is connected, and that he conceives the same will be of great public utility," &c. The Solicitor General says, the patent would be satisfied if one machine would make paper of only one length, and one width; so that when his client takes out a patent for a machine to make paper of all widths,

*viii] *he then contends that that is satisfied by showing that you must have
a separate machine for every width. If a man said, "I have invented a mortar, which will fire off bomb-shells of from one to eighty pounds;" would he be speaking the language of either honesty or truth, if it turned out, that you must have eighty mortars to answer the purpose? In the way in which it is stated in the patent, it appears that the width may be varied as much as the length, and that by the same machine. It is said, that the same machine may be altered by various means, so as to make paper of different widths; but, with those alterations, that would not be the machine mentioned in the patent and specifications.

Brougham and Alderson were stopped by the Court.

ABBOTT, C. J. We are of opinion, that one of the objections raised on the part of the defendant is good. If there is a misrepresentation made to the Crown, the patent is void; and what the representation to the Crown was, must be collected from the recital. Now, it is here recited in the letters patent, that the invention is for producing a certain effect with one machine, and that that one machine will make paper of all widths from one to twelve feet. The evidence shows, that no one machine will produce this effect, at least, I think such is the evidence; and at all events, we think, there must be a new trial, to have this point laid before the Jury. If this fact is so, the objection is fatal to the original grant; and we are of opinion, that it cannot be cured either by the act of Parliament, or the specifications.

Rule absolute for a new trial.

SAUNDERS v. MUSGRAVE, Bart.

See ante, p. 294.

In this case the Court were of opinion that the sum mentioned was to be considered as rent; and therefore that it was properly deducted by the defendant out of the proceeds of the execution. The marginal note of this case must therefore be altered in the eighth line from the end, by substituting the words "has a right," for the words "ought not."

FAYLE v. BIRD.

SEE ante, p. 803.

In the course of last *Easter* Term, the rule in this case came on to be gued.

F. Pollock showed cause.

Hutchinson was heard in support of it.

The Court yielded to the authority of the case in the Common Pleas, upon

which the rule nisi was obtained, and therefore made it absolute.

The only alteration which it will be necessary to make in the marginal nots of this case, will be to strike out the words "semble that," and insert the word "necessary."

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Gillurp

PRINCIPAL MATTERS.

ACCEPTANCE OF GOODS.

The marking by the vendor, of casks of wine, lying in the docks, with the initials of the purchaser, at his request, and in his presence, the terms of payment not If a written paper contain a specification having been settled at the time, and consequently the contract not being complete, is not an acceptance under the 17th section of the statute of frauds. Proctor v. Jones. PAGE 532

ACCOMPLICE.

See EVIDENCE, 5.

ACTION, CROSS, FOR LEAVING SER-VICE

See MASTER AND SERVANT, 1.

ADDITION.

If goods be laid in an indictment, as the property of A. W. G., Esquire, the addition is not material; and if he is not an esquire, it is no ground for an acquittal. Rex v. Ogilvie. 230

ADMISSION.

See DAMAGES.

If the defendant has said that he cannot pay a debt, but will give a bill for it, and the amount be not mentioned, but the defendant speak of having been arrested for it, proof of this admission will entitle the plaintiff to a verdict for 10L, as the defendant could not have been arrested for a less sum. Brathwaite v. Churchill.

See Endresiment, 1.—Principal and AGENT, 1.

AGREEMENT.

See BANKRUPT, 10.—BROKER, 2.—SEERIFF 2.—Seip, 4.—Stamp, 4, 6.

of goods, and the vendor by it agree " to finish the goods in a tradesman-like manner;" this agreement does not require any stamp, as it is an agreement for the sale of goods, and not for the doing of work. And it need not be specially declared on. Hughes v. Breeds.

2. In assumpsit on a written agreement, where the attesting witness to the execution was not produced at the trial; it was held sufficient, in order to let in evidence of his handwriting, to prove by a person who knew him, that he had not seen him for eighteen months: that, at the request of the plaintiffs' attorney, he had made inquiry for him at coffee houses, and other places where he thought he might hear of him, but without success; and that it was not necessary to show that inquiry had been made of both the par ties who had executed the agreement An agreement for letting premises (under hand only) was signed, "H. Curtis & Co.," and it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose hand-writing it was signed:—Held, upon evidence that both persons acted in the business, that there was sufficient proof of an execution by the partnership. If an agreement for letting part of a house, at a rent of 30%, contains a clause that the tenant shall be liable only to the said rent, such clause is a clause of indemnity, and an action will lie upon it, if the

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tenant's goods are seized under a distress for rent by the original landlord, though the party giving the indemnity be not the immediate tenant of such original landlord. But if no notice be given to the party indemnifying, that he may pay the rent, and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts. Evans v. Curtis. 296

3 A. makes an agreement with B. for the sale of prembes, at the time in the possession of a under an agreement for four years, (hree of which have expired,) and undertakes to B. that he will do such repairs as are left undone by C., at the expiration of his (C.'s) tenancy. B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair.—Semble, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy, as created by the agreement between A. and C. If the declaration in an action by B. against A. aver that C. did not leave the premises in good repair, at the expiration of his tenancy; the agreement between A. and C. need not be produced to prove such averment. Goodson v. Gouldsmith.

Whatever may be the terms of an agreement, with regard to the sum to be paid on the non-performance of it, the party suing, if the agreement be not under seal, is only entitled to such damages as a jury under all the circumstances shall think fit to award. Randall v. Everet.

A performer, who is called upon to resume, in consequence of the illness of another, a part in which by previous performances she has acquired celebrity, is entitled to reasonable notice, previous o the time of performance. Graddon v. Price.

ALLEGATION.

See ARREST.

An allegation in a declaration that the plaintiff lent a horse, is supported by evidence that what he lent was a mare. In an action for injury to a horse, proof that the defendant, on being charged with driving it from London to Chatham, instead of to Dartford, according to his undertaking, stated, that in fact he only drove to Dartford, is sufficient to support an allegation that the contract was to drive only to Dartford; and it is not necessary to offer distinct evidence of what took place at the time when the agreement was made. In such an action, if it appear that the animal was the property of the plaintiff, but let by a stable-

keeper to the defendant for a pecuniary recompense, the Judge at the trial will not call upon the plaintiff to show that he was authorized to let horses for hire if the defendant does not produce any statute or other authority making regulations on the subject; nor in the absence of such authority will he reserve the point. Ware v. Juda.

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If there be a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170L a year, and afterwards an arrangement is made by parol that 30L a year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it; and therefore an allegation is correct which states it to be 170L Hilton v. Goodhind.

3. An allegation in a declaration in slander, which states, that "by reason of the premises, divers persons, to wit" &c., "who would otherwise have retained and employed the plaintiff, wholly declined and refused so to do," is not supported by evidence which shows that other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed him on such recommendation. Sterry v. Foremen.

APOTHECARY.

In an action for an apothecary's bill, it is necessary, since the stat. 6 Gen. 4, c. 1, s. 3, to prove that the seal affixed to a certificate to practise as an apothecary, is the common seal of the Apothecary's Company. Chadwick v. Bunning. 106
 An apothecary is entitled to recover for business done in London, if he had a general certificate from the Apothecary's Company of his fitness to practise, though he paid but 61. 6s. on his obtaining it.

APPRENTICE.

If a person take a lad a month on liking with an intention of his being bound as an apprentice, if he and the lad suit one another, and the lad stay several months without any indenture being executed, no fresh agreement being entered into, he is not entitled to charge for the board and lodging of the lad whom he employed in his trade; and by consequence he is not entitled to set it off in an action by the lad's father for money lent. Wilkins v. Wells.

ARREST.

If a sheriff's officer send his servant to a party to inform him that there is a writ out against him, and that he must come

and give bail to it, and the party go to the officer's house and execute a bailbond, this is not an arrest. A person may, on a declaration properly framed, recover for being maliciously held to bail, if he gave bail to prevent being arrested, on a declaration for a malicious arrest. An allegation, that the defendant maliciously caused the plaintiff to be arrested, and to be detained in prison until, in order to procure his release, he was forced to procure bail, is not a divisible allegation. And if there was a given bail proved, but no evidence of any arrest, that is not sufficient Berry v. Adamson, Gent., One, &c.

ASSAULT.

See BROTERR, 1.

- Assault by a master on his servant. Justification, molliter manus, to remove him from a house of which the master was possessed:—Held, that evidence of another servant of defendant's having the key to let himself in to work, nobody living in the house, is sufficient evidence of the defendant's possession as against the plaintiff, to support the plea. Hall v. Damis.
- 2. In an action of assault, what was said by the magistrate to the plaintiff at a previous investigation of the circumstances before him, cannot be received in evidence at the trial on the part of the defendant, unless it drew any observation in reply from the plaintiff. Child. Grace.

ASSIGNEE.

An assignee of a lease under the insolvent debtors' act is entitled to a reasonable time in which to decide whether he will accept the lease or not; and during that time he may take such steps as he may think necessary for the purpose of trying to render the property productive. Lindary v. Limbert. 526

ASSUMPSIT.

See DAMAGES, 1.—WITHESS, 8.

- 1. The City of London Gas Light and Coke Company may maintain assumpsit for gas supplied to the occupiers of a wharf; and it is not necessary in such a case that there should have been any contract by deed executed by the company. The City of London Gas Light and Coke Company v. Nicholls.

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- pany v. Nicholls. 365
 2. The Southwark Bridge Company may maintain assumpsit for the use and occupation of premises held under them. The Southwark Bridge Company v. Sills.

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ATTESTATION.

See DEED, 1 .- WILL, 2.

ATTORNEY.

See Nucliebuce, 1.—Practice, 6.—Witness, 2.

- A charge for searching whether satisfaction of a judgment was entered, or whether an issue was entered, will not constitute an attorney's bill a taxable bill, so as to make it necessary to deliver is signed before action brought. Fenton, Gent., One, &c., v. Correia.
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 2. If an attorney has the money of a client in his hands, and pays such money to the credit of his private account at his banker's, and that banker fail, he will be liable for the amount to the client, although he does so bona fide, and have a large sum of money of his own at that banker's. His proper mode would be, to open a new account with a banker in his own name, but to the credit of A. B.'s estate. Robinson, Clerk, v. Ward, Gent., One, &c.
- living in the house, is sufficient evidence of the defendant's possession as against the plaintiff, to support the plea. Hall v.

 Davis.

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 In an attorney's bill, it is not sufficient to charge the costs of an action brought for the now defendant by the plaintiffs as attorneys, at one sum in the lump, although the costs in that action had been taxed at that sum as between party and party. Drew and Others, Gents., Three, stances before him, cannot be received in
 - 4. In an action on an attorney's bill, it is sufficient, to bring the bill within the stat. 2 Geo. 2, c. 23, that some of the items upon the face of them are of such a nature as to show that a cause must have been depending in some Court: and it is not necessary to prove aliunde that there was a cause depending. Watt v. Colling.
 - 5. An attorney is not to lose the amount of his bill on account of any error in the execution of his duty, being such an error as a cautious man might fall into; but if the charges contained in his bill are brought upon the client by his inadvertence, he cannot recover them in an action. Montriou, Gent., v. Jefferys. 1136. If an attorney, having given credit to a person for the costs of a suit, put for
 - i. If an attorney, having given credit to a person for the costs of a suit, put for ward such a person as a witness, and have him examined on the trial of the cause without a release, (no objection being taken,) he cannot afterwards maintain an action against him for the recovery of such costs.—If an attorney's clerk give a receipt for money on account of a different person from that to whom he gives credit, to enable such person to deceive others, such act of the clerk will not affect the master's right to recover the remainder against such person, though, if the attorney had done it himself, it would be good ground for non-

Williams, Gent., One, &c., v. Goodsuit. wit.

AUCTION.

If the owner of goods sold by auction employs a person to puff at the sale, he cannot recover against a bona fide purchaser, whose bidding was enhanced by such puffing. Crowder v. Austin.

AUTREFOIS ACQUIT.

1. If in a plea of autrefois acquit the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But semble, that if he insisted on the wrong, the Court would, in a capital case, take care that he did not suffer by it. Rex v. Sheen.

2. If the prisoner could have been legally convicted on the first indictment, upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the 2. The banker of one of the parties in a trial of the first indictment or not. Ibid. 3. Form of plea and replication.

AVERMENT.

See AGREEMENT, 3.—WARRANTY, 4.

AWARD.

When a cause is referred to arbitration the mode of conducting it must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attornies, and examine witnesses privately, at their (the witnesses') houses, it seems that such conduct is no good ground of objection, provided it does not proceed from corrupt motives. At all events, if either party would take advantage of it, he must give notice at the time, that he intends to rely on it as an objection; and if he lie by and suffers other meetings to take place, and when the arbitrators are ready to make their award, revokes his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award. Hewlett v. Laycock.

BAIL.

See Arrest, 1.

BAIL BOND.

See ARREST, 1 .- PLEADING, 1.

BANK NOTES.

See CHECK, 2.—PRACTICE, 7.

1. If a banker, in a small market town, change a 500l. Bank of England note for a stranger, without any further inquiry than merely asking his name, he is liable in trover to a party from whose possession such note had been unlawfully obtained; and the question in such case is not, whether there was an honest holding on the part of the defendant, but whether under the circumstances there was a want of due caution. The plaintiff, however, in such case, must show that he has done every thing which in reason he ought A dividend warrant was paid into a banker's by a customer; the banker sent it by a porter of the house to the Bank of England, to get cash for it; he returned without the money, saying he had been robbed of it: Held. (the porter himself being dead,) that proof of those facts was sufficient evidence of possession on the part of the bankers to enable them to maintain trooper for a 500L note, part of the money, against a party into whose hands it had come, under circumstances which would not entitle him to retain possession of it. Snow v. Peaceck.

cause is bound to answer what such party's balance was on a given day, as it is not a privileged communication.

Loyd v. Freshfield. 325

3. In actions for money had and received, brought by the owners of lost bank notes, against those who may have got them into their hands without giving value, it is not absolutely necessary for the plaintiff to give direct evidence of the loss. It is sufficient if such circumstances are shown as satisfy the jury of the fact of the loss. Holiday v. Sigil.

4. In an action of trover, to recover bank notes belonging to the plaintiffs, which the defendants had taken without using due caution, if it appear that the plain-tiffs' porter had different securities for money, to get turned into bank notes and cash; and that he came back with the odd cash, but alleged that the notes, which were the remaining proceeds of the securities, were stolen, it will be for the jury to say, whether the securities were stolen from him before they were cashed, or whether the bank notes were stolen afterwards, and when they were the property of the plaintiffs in his hands. If the latter, it is not material whether the porter purloined the bank notes himself, or was robbed of them by thieves. If the defendants received notice of the loss, that notice is not to be considered in point of law as operating as a notice for all time: and unless such notice be renewed, it will be for the jury to say, whether, if the defendants heard no more of the matter for a year or more. they might not fairly conclude that the notes had been got back. A mistake of the date of one of the notes in such a notice (the number and amount being

correctly stated) will not avail the defendants, unless they were misled by it. And it is no answer to an action of this kind that the defendants were always in the habit of changing notes for strangers, without asking the names, &c., of those who brought them, nor even that other country bankers did so; provided the jury are satisfied that the defendants took those notes, under such circumstances as would awaken suspicion in the mind of a reasonable man acquainted with business. Snow v. Leatham. 314

BANKRUPT.

See DELIVERY-ORDER, 1 .- DISTRESS, 2 .-Notice, 3.—Signature, 1.—Witness, 8.

- 1. If a trader, who is in the rules of the King's Bench prison, come to his own shop out of the rules, and is there denied 9. If a person against whom a commission to a clerk of a creditor, it appearing by the evidence that the shop was shut up for the evening, but at an earlier hour than usual, it is proper to be left to the jury to say, whether the bankrupt had himself denied to delay his creditor, or whether it was because the clerk called at an unreasonable hour. Hughes v. Gillman.
- 2. If it be necessary to prove a good petitioning creditor's debt on the 20th of May, it is not sufficient to show that, on the 29th of Junuary previous, a sum of 100L was due, and that there were receipts and payments afterwards; but it must be proved, that on the specific day as much as 100% was owing. Gresley v. Price. 48
- 3. A debtor to a bankrupt, when sued by his assignee, cannot set up the stat of limitations as an objection to the petitioning creditor's debt. Mavor v. Pyne. 91
- 4. An allegation, stating that, before the execution of a certain release, the party who executed it " became and was a bankrupt," is supported by proof of his having executed it after an act of bankruptcy, which was not followed by a commission for nearly two years, it appearing that the execution took place while the party was in prison.
- 5. If a debtor to a bankrupt estate, on being applied to by a person whom he knows to be the collector of the debts for the assignee, says, "I will call and pay the money," such promise is an admission of the right of the assignee, and renders it unnecessary in an action for the money to give the usual proofs in support of the commission. Pope v. Monk.
- 6. The messenger under a commission of bankrupt may recover from the petitioning creditor his fees for his services, before the party be declared a bankrupt, though the party was since declared a bankrupt, and the messenger's bill order-

ed by the commissioners to be paid by the assignees out of the estate. Burwood v. Kant. 123

- 7. A party, to become bankrupt, must be a trader at the time of the petitioning creditor's debt; but if that was contracted while he was a trader, and he leave off trade, he may still become a bankrupt. Doe dem. Barraud v. Lawrence.
- 8. If one procure orders for goods, having no stock, but buying them from those who have, he making out bills to his customers in his own name, and being himself debited by the person he buys of, that is a trading within the bankrupt laws; but if he procure orders for another, and is by that person paid a commission, the other person sending the goods to the customers, this was not a trading within the bankrupt laws antecedent to the stat 6 Geo. 4, c. 16.
- of bankrupt is sued out, apply to a judge at chambers, and obtain his discharge from custody, on the ground that his detaining creditors have proved under the commission, such person is, by so doing, precluded from disputing the validity of the commission in a court of law, but may apply to the great seal. Watson v. Wace.
- An agreement was made, by which the funds of a bankrupt's estate were assigned to a certain person, who was to secure 5s. in the pound to all the creditors; in consequence of which the proceedings under a commission which had issued, were to be stayed. The agreement contained a clause making the arrangement void, if any creditor, whose debt was above 104, should refuse to come in. deed was afterwards prepared, in which however a similar clause was not insert-The deed contained a release, but recited the circumstances as a consideration:—Held, that promissory notes given in pursuance of the agreement to a creditor, who executed the deed, could not be sued upon by him, it appearing that the commission went on; and the funds were withdrawn from the hands of the maker of the notes, in consequence of the refusal of one of the creditors to execute the deed and enter into the arrangement. Enderby v. Corder.
- 11. If a trader deny himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonored, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him. Bleasby v. Crossley.
- 12. If one lend another a check for 1004 such check is not evidence of a good

petitioning creditor's debt, unless it be proved that it was paid.

13. A trader stopped payment generally, on the 5th of January, and on the evening of the 6th sent a 100% note to a particular creditor, saying, it was to help him over his payments:—Held, that such trader afterwards becoming bankrupt.

2. If a party possess himself of a stolen bill or note improperly, a demand and a his assignees might recover the money in assumpsit; although it appeared that at the time of payment a bill for a larger amount was becoming due, which had been accepted by the creditor for the bankrupt's accommodation, and for which he had promised to provide; and that the creditor could not be considered as the agent of the bankrupt to pay the money for the bill, because he being a party to it the payment operated pro tanto in his discharge. Guthrie v. Crossley. 301

14. In an action by the assignees of a bankrupt, communications made by the bankrupt to his attorney may be given in evidence to prove the act of bankruptcy, if the bankrupt consents; and it does not lie in the mouth of the defendant to take the objection to their disclosure. Merle v. Moore. 275

15. A warrant under the stat. 6 Geo. 4, c. 16, s. 29, to search for the goods of a bankrupt in the house of a third person, is not valid, if granted to any one except the messenger under the commission. Sly v. Stevenson.

16. If A. let a house to B., with a covenant that the lease shall determine on B. committing any act of bankruptcy on which a commission of bankrupt should issue. And by another deed of the same date A. grants the use of the furniture to B., in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy. If B. become bankrupt, and the Jury find that B. was the reputed owner of the furniture, it will pass to the assignees notwithstanding these covenants. And if it be proved on the one side that several of the servants of B., and many of his customers knew that the goods belonged to A., and on the other side several of B's creditors prove that they considered the goods to belong to B., and gave him credit on the faith of them; and that he acted as master of the house, &c.; it will be for the Jury to say, whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them. Hickenbotham v. Groves.

BILL OF EXCHANGE.

See Contraband, 1. - Partner, 1, 3. PARTICULAR OF DEMAND, 1. - PROMIS-SORY NOTE.-WITHERS, 6.

1. If an accommodation bill be drawn pay-

able to "--, or order." and after ac ceptance a bona fide holder insert his name in the blank, the bill is not thereby vitiated: and it may be sued upon without having any fresh stamp. Atwood v. Griffin.

refusal are not necessary, previous to an action of trover brought for its recovery by the loser. Beckwith v. Corrall.

3. If a party be robbed of a negotiable security eight days before it is payable, and does not give notice of his loss till the end of seven days, and then only to the payee, but gives no notice of any kind to the public, he does not use due diligence, and cannot recover in treer against a party who discounted such security six days after the loss.

And in such a case the questions proper for the Jury are—1st, whether the plaintiff has used due diligence—and then, whether the defendant has acted with due caution, unless there should be reason to suspect that the defendant knew, when he discounted the security, that it had been obtained by means of felony-in which case the conduct of the plaintiff may be left out of the question.

5. If an action is brought on a bill of exchange, not having any English stamp, and purporting to be drawn at Paris, the defendant will be entitled to a verdict, if it appear from the evidence that the plaintiff must have been in England on the day on which it purports to have been drawn: but it will be sufficient to enable the plaintiff to recover, if the bill was drawn at a place in France, nearer to England than Paris, though it be dated as from Paris. Bire v. Moreau.

6. In assumpsit on a bill of exchange against the acceptor, when the bill is drawn payable to order in London, it is not necessary to prove presentment at Fayle v. Bird some place in London. 303. Addenda ix

7. If a letter, giving notice of the dishonor of a bill, contain this passage, "I did not know where, till within these few days, you were to be found."—Such passage is not to be taken as proving that the notice was not given on the next day after the residence of the party was discovered. Kerby v. England.

492 8. If after a bill of exchange has been dishonored, and notice of dishonor duly given, the holder take part of the amount of the acceptor, and offer to take a warrant of attorney to secure the payment of the residue by instalments, which offer is not accepted: this is not such a giving of time to the acceptor, as will discharge the drawer; but, if the holder had dis-

abled himself from suing on the bill, it is otherwise. Hewet v. Goodrich. 468

9 An acceptor of a bill is not discharged, by the bill not being presented for payment for three or four years after it becomes due. He is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him. Farquhar v. Southey. 497

10. In trover for a bill of exchange, the Jury may, if they think fit, include the amount of the interest in the damages, and this although there is no mention of interest in the declaration, and no special damage laid. Paine v. Pritchard. 558

11. If it be ambiguous, whether an instrument be a bill of exchange or a promissory note, the person who receives it may treat it as either. An instrument in the form of a note, but which is in addition addressed to a third party who accepts it, is a promissory note. Edie v. Buru.

12. The drawer of a bill for 2001, not having received due notice of its dishonor, said, that he did not mean to insist upon want of notice, but added, that he was only bound to pay 701. The whole of his statement must be taken together, and the holder in an action against him, can only recover to the amount of 701. Fletcher, assignee of Billinge, v. Frograti.

13. If the drawer of a bill, payable to his own order, before it is indorsed, give the acceptor a general release, this is no defence to an action by the indorsee against the acceptor, unless there be proof that the indorsee knew of the release. Dod v. Edwards.

14. In an action by the indorsee against the acceptor of a bill of exchange, if the defendant show that there was originally no consideration for the bill, it then lies on the other party to show, that he or some previous indorsee gave value for it. Thomas v. Newton. 606

15. What is said by a third party, at the time of the signing of a promissory note, as to the consideration for which it is given, is not evidence against the payee, if he was not present. Healey v. Jacob.

16. If a party receive bills of exchange for goods sold, and pay them away, but afterwards get them back, and they are, at the time of the trial of an action of assumpait for the price of the goods, lying protested in the hands of his agent, he may recover the money due, without delivering up the bills, and the defendant must seek relief in equity, if they are not delivered up. Hadwen v. Mendisabal. 20

17. To support an action on a promise by an indorser to reimburse the law expenses to the holder, if he will sue the acceptor, he need not show that he has actually paid his attorney Bullock v. Lloyd. 119

BOND.

See STAMP, 3.

In an action on an annuity bond given by a man to a woman with whom he cohabits, the question for the consideration of the Jury is, whether, at the time when it was given, there was or was not an intention and agreement to continue the connection in future. For if there was such intention, and the bond was given in furtherance of such arrangement, the plaintiff cannot recover. Friend v. Harrison.

BROKER.

See Construction, 1. — Money had and received, 1.—Montoage of Ship, 1

A plaintiff cannot sue another for not accepting goods, if the contract note was only signed by the plaintiff; for if the plaintiff only acted as a broker, he cannot sue as a principal: and if he were a principal, his signing would not bind the defendant. Rayner v. Linthorne. 124

An agreement by a broker that he will sell goods for his principals, and pay over the proceeds without setting off a debt due from the principals to him, is not binding. But if he also agrees not to set off a debt due from a prior firm, which, by a previous letter, the principals had agreed to pay him, the principals having assumed the funds of that firm—the letter and the agreement must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods. McGilliwray v. Simson.

BROTHER.

There is no obligation on one brother to maintain another, so as to make the omission indictable.—If one has his idiot brother, who is helpless, as an inmate of his house, and omits to supply him with proper food, warmth, &c., he is not indictable for the omission.—If one has an idiot brother, who is bedridden, in his house, and keeps him in a dark room, without sufficient warmth or clothing, this will not be an assault or an imprisonment; nor will proof of this support an indictment for an assault or an impriment. Rex v. Smith.

BURGLARY.

If there be an aperture in a cellar window to admit the light, through which a thief enters in the night, this is not burglary Rex v. Lewis

CARRIER.

See PRINCIPAL AND AGENT, 2.

1. A keeper of a booking-office cannot set up a notice, that he will not be answerable above a certain value, as a defence in a case of negligence of himself or his servants. Newborn v. Just.

2. If goods be sold by A. to B., and sent by C., a carrier, and on their arrival at the town in which B. resides, he takes samples of them, and having no warehouse of his own, lets them remain in the warehouse of C.—they cannot after that be stopped in transitu. Foster v. Frampton.

3. Evidence that at the door of a bookingoffice there is a board, on which is painted, "Conveyances to all parts of the world," and a list of names of places, is not a sufficient proof that the owner of the office is a common carrier, so as to charge him for the loss of a box which was booked there. Upston v. Slark. 598

L If a parcel is given to a wagoner for him to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. If a box of clothes, packed by the party's own hand, be sent by a carrier, and lost, the Judge will recommend the Jury to give the fair value of it in damages, although what particular articles the box 2. If two prisoners are indicted for uttering contained cannot be proved. Butler v. Basing. 613

CATTLE.

See MAINING CATTLE, 1.

CHARTER-PARTY.

See Construction, 1

CHECK.

See Public House, 2.

1. The plaintiff having lost a check, five days after it bore date, which was taken by the defendants for value, but under such circumstances as ought to have excited their suspicion:—Held, that the plaintiff may maintain an action for money had and received against them, for the amount of it, though he gives no evidence how he lost it, or how it got out of his possession. Whether such evidence would have been necessary, if the check had been received by the defendants on the day it bore date-Quere? Downe v. Halling and Others.

2. If a check drawn by one of the parties in a cause, be proved to be in the hands of the banker of such party, (having paid it,) the opposite party need not, if he wishes to have it put in evidence, call the banker's clerk to produce it, but may call for it under a notice to produce Burton v. Payne.

CLERK.

See Attornet, 5. - Notice, 3. - Master AND SERVANT, 1.

CLUB-HOUSE.

76 1. The master of a club-house is the proper person to sue one of its members for the arrears of his subscriptions; and if. by one of its rules, every member is to be taken as continuing so, unless he give previous notice of his intention to discontinue being a member, he is liable to be sued for his arrears of subscriptions, unless he can prove that he gave such notice. Raggett v. Bishop.

2. If the rules of a club be contained in a book kept by the master of the club, and accessible to the members, every member of the club must be taken to be acquainted with them. Raggett v. Musgrase, Bart.

COINING AND UTTERING COUN-TERFEIT COIN.

1. A collar of iron, for graining the edges of counterfeit money, is an instrument within the stat. 8 & 9 W. 3, c. 26, a. 1, though it is to be used in a coining press. Rex v. Theodore Moore.

a counterfeit shilling, having another counterfeit shilling in their possession, it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of money are proved to be counterfeit; and if it appear that the two prisoners went to a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other pieces of bad money, both may be convicted; the uttering and the possession being both joint. Rex v. Skerritt.

COMMISSIONERS.

If certain commissioners under a private act of Parliament may sue and be sued by their clerk, it is not necessary, at the trial of an action brought in the name of the clerk, to prove that he sues by Truwhitt v. Depree. 551 their authority.

COMPENSATION.

See Nuisance, 3.

CONSENT OF OWNER.

See Tinber.

CONSPIRACY.

See JOINT STOCK COMPANY, &

CONSTABLE.

See False Imprisonment, 6, 7.

A constable who delivers a copy of his warrant to the party grieved, cannot thereby discharge himself, unless the party has thereby a right of action (supposing the warrant illegal) against the magistrate under whom he acts. Ny v. Stevenson.

CONSTRUCTION.

See Wond.

If one construction of a charter party be much in favor of one of the parties, and an opposite construction equally in favor of the other, the evidence of the broker through whom it is entered into, as to what was said at the time of its execution, is of too dangerous a nature to be much relied on. Taylor v. Briggs. 525

CONTRABAND.

If the importation of certain goods be prohibited, and the plaintiff sell such goods in this country to A., who indorses a bill of exchange to him in payment; the plaintiff cannot recover on that bill, against the acceptor, although there was no evidence that the plaintiff was the importer of the prohibited goods. Billand v. Hayden.

CONTRACT.

See Acceptance, 1.—Public House, 1.— Use and Occupation, 1.

1. Assumpsit on a judgment of the Admiralty Court of Scotland, which gave interest on a balance of accounts from 1811, to the time of payment. The contract was by letter written in London; the services were performed in Scotland, that being the plaintiff's place of residence: Held, at Ni. Pri., that a contract made in England, to be executed in Scotland, ought to be regulated by the rules of the English law; and that this contract having been made in England, interest could not be recovered, though given by the decree in Scotland. Arnott v. Redfern. 88

2. In an action on a joint contract against two defendants, an arrangement proposed by one defendant, that each should pay a moiety of the damages, cannot be made, unless the other defendant, either in person or by counsel, consents, though it is a relief of such defendant, who might otherwise have execution takenout against him for the whole. Dickenson v. Goom & Barnes.

CONTRIBUTION.

See PARTHER, 6.

CONVERSION.

See MILLER, 1.

COPYRIGHT.

No action can be maintained for pirating a work which professes to be the amours of a courtezan, and it is no answer to the objection that the defendant is also a wrong doer in publishing them, and that he therefore ought not to set up their immorality. Semble, that a person being seen correcting the manuscript, is not sufficient evidence that the copyright of the work is his. Stockdale v. Onwhyn.

CORPORATION.

See Assumpsit, 1, 2.

COSTS.

See Attorney, 5.

COVENANT.

See FORFEITURE, 2.—BARRRUPT, 16.

- 1. If a covenant is entered into, that if the plaintiff will procure the defendant to be appointed to an office, he will pay the plaintiff a share of the emoluments, and this without the knowledge of the person who has the right of appointing to the office:—This is such a fraud on him as will avoid the covenant, whether the office is lawfully saleable or not. Waldo v. Martin.
- 2. If there are two parts of a covenant under seal, one of them on a stamp, and executed by the defendant, and the other a counterpart not stamped, and the party who had the custody of the part which was stamped at the time of bringing an action upon it has lost it, and it cannot be produced, he may prove the draft as secondary evidence, and is not compellable to take the unstamped counterpart subject to the objections that may be made to it, though he has given notice to produce it at the trial. Munn v. Godbold.
- 3. If a lessor covenant in a lease with his lessee that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, and not to rebuild any additional parts which may have been erected by the tenant. Loader v. Kemp.

COUNTY COURT.

See Sheriff, 3.

COURT OF CONSCIENCE.

A Court for the recovery of debts under 40s may give judgment for the plaintiff, although it appear the debt was above 40s., if the plaintiff will waive so much of his debt as will bring his claim under 40s., provided there be nothing in the act of Parliament constituting that Court which prevents its so doing. The judgment of a Court for the recovery of debts under 40s, is not conclusive; but proof that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits, is proper for the consideration of the jury. Barries v. Winkler.

COURT MARTIAL.

See FALSE IMPRISONMENT, 1.

CREDIT.

See ATTORNEY, 5.

DAMAGES.

See Admission. - Agreement, 4. - Con-TRACT, 2 .- SERVICE, LOSS OF, 1.

Assumpsit for goods sold. If a defendant say that he owes the debt, and that the plaintiff has applied to him to pay him, and that he will do so as soon as he can, but does not mention any sum; on this evidence the plaintiff is entitled to a verdict with nominal damages. Discon v Doveridge.

DATE.

See BIGNATURE, 1.

DAY RULE.

A prisoner in the Fleet prison had obtained a day rule in the usual form, permitting him to go abroad to transact his affairs, and advise with his counsel, and to return the same day; he went to Sadler's Wells Theatre, where he was seen as late as half-past eleven in the evening: Held, that if he returned within the ambit of the prison before twelve at night, the Warden could not be liable in an action for an escape, notwithstanding the abuse and misapplication of the rule. Ruthven v. Brown.

DEBT.

See STATUTE OF FRAUDS, 1.

In an action for money had and received, See Bill of Exchange, 2.—Forfeiture, 1 if it appear that the defendant received the money from the plaintiff to carry to a bank, and that instead of so doing, the defendant kept it; the Judge will leave If a freighter is to discharge within twelve

ant received it with an intent to steal it, and then feloniously converted it; and if the jury find this in the affirmative, the Judge will direct a verdict to be entered for the defendant, and that the defendant shall be tried for the felony on this find ing. Prosser v. Rowe.

DECEIT.

See Goods RETURNED, 1.

DECLARATION.

See AGREEMENT, 3. - MALICIOUS ARREST. –Warbahty, 4.

DEEDS.

Deeds ought to be attested in the same room in which they are executed, and not carried away for attestation; the witnesses ought to be careful that they hear the formal words of delivery used; and it is highly expedient that the party executing should state that he fully understands what he is executing. But to make the party designate the instrument in the presence of the witnesses, as by saying, "this is my power of attorney, or the like, would be laying down a rule sometimes productive of inconvenience. Loyd v. Freshfield.

DELAY.

See Goods RETURNED.

DELIVERY OF DEED.

See DEEDS, 1.

DELIVERY OF GOODS.

See MILLER, 1.

DELIVERY ORDER.

See MILLER, 1.

The lodging a delivery order with a wharfinger is sufficient to transfer the property in goods lying at a wharf, without any re-weighing or re-housing; and if the party giving the order afterwards become bankrupt, his assignees cannot maintain trover under such circumstances, as for goods in his order and disposition. Tucker v. Ruston.

DEMAND.

DEMURRAGE.

it to the jury to say whether the defend- running days after the vessel's arrival,

and he is prevented from discharging, at first, by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole oriwhen he is able to commence discharging. Rogers v. Hunter.

DEPOSIT.

See Public House, 1.

DILAPIDATIONS.

- 1. The executors of a deceased incumbent are not bound to put the rectory house into a finished state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation "Percival" (Clerk) v. of the premises. Cooke.
- 2. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber, in the estimate of dilapidations due from them.

DISTRESS.

See WARRHOUSE, 1

1. A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom be occupies. Fisher v. Algar.

2. The request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises, beyond the If an engineer is employed by a committee proper time of selling, if he did not know which were the goods of the lodger, and which those of the tenant.

3. Barges lying in a river, close to a wharf, and fastened to piles intended partly for the support of the wharf, and partly that barges may be attached to them, may be distrained for rent due in respect of the wharf, they being as much on the prewill admit of. Buszard v. Capel. 541

DOCKS.

See ACCEPTANCE, 1.

DOUBLE RENT.

A landlord has no right to distrain for double rent upon a weekly tenant, who holds over after notice to quit Sulloan 359 v. Bishop.

DOWER.

has not been assigned. Doe d. Nutt v. Nutt.

EJECTMENT.

See Insolvent, 1.—Dower, 1.

ginal number of days from the time 1. In an action of ejectment the plaintiff must be nonsuited, if it be proved that a notice to quit at the end of six months was given by the lessor of the plaintiff to the occupier of the premises, a short time before the bringing of the action. Doe d. Scott v. Miller.

2. In ejectment by an heir-at-law against a defendant, who claims under a lease granted by an ancestor of the lessor of the plaintiff, if such lease, being in the hands of the lessor of the plaintiff, be produced at the trial by him on notice, it may be given in evidence without proof of its execution by the subscribing witness. Doe d. Tindale v. Hemming. 462

EMBEZZLEMENT.

The statute 53 Geo. 3, c. 63, for preventing the embezzlement of securities, &c., by agents, applies only to persons to whom such securities, &c., are entrusted in the exercise of their function or business. Rex v. Prince.

ENTRIES, OLD.

See Parine, 1.

ESCAPE.

See DAY-RULE, 1.

ESTIMATE

for erecting a bridge and forming a road to it, to make an estimate of the expense of the works, he is bound to ascertain for himself, by experiments, the nature of the soil-though a person previously employed by such committee, having made the experiments, gives him, by their desire, information of the result. mises demised as the nature of the thing 2. If an engineer, employed as above, Moneypenny v. Hartland. makes a low estimate, and thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it; and it turns out afterwards that such estimate is incorrect, either from negligence or want of skill, and that the work cannot be done but at a much greater expense, he is not entitled to recover any thing for his trouble in making such estimate. Moneypenny v. Hartland.

EVIDENCE.

See Admission.—Agreement, 2.—Aleboa-Steatment does not lie for dower which | TION, 1.—ASSAULT, 1, 2.—BANK NOTES.

-BARKEUPT, 14.-CEECK, 1, 2.-Coix-ING AND UTTERING, 2.—CONSTRUCTION, 1.—CONTRABAND, 1. — COPYRIGHT, 1.-COVENANT, 2.— DAMAGES, 1.— EJECT-MENT, 2.—FALSE IMPRISONMENT, 1, 2.— FALSE REPRESENTATION, 1 .- FINE, FORRIGN STATE, 1.—HUSBAND AND WIFE, 2, 3.—INDICTMENT, 1.—LARCENY, 1, 2.-LIBEL, 2, 3.-MAGISTRATE, 1.-MILLER, 2.—Parise, 1.—Partner, 2.—Patent, 1. — PLEADING, 1. — PRACTICE, 4, 6, 7. - Promissory Note, 1.-Registry of DEEDS, 1 .- SEDUCTION, 1 .- SIGNATURE, 1. — SLANDER, 2. — STOFFING IN TRAN-SITU, 1.—TIMBER, 1.—TIMES, 2.—WAR-RANTY, 3.—WILL, 1.—WRIT OF RIGHT, 5.-WRITING, HAND, 1.

1. The fact of a letter having been sent to a woman some years before her death, is not sufficient to raise a presumption that such letter is in the custody of her executrix three or four years after, as the testatrix might have destroyed it in her lifetime. Drew v. Durnborough. 198

2 A person to whom certain letters, required to be produced on a trial, were written, said that he had searched in a particular box in which he thought he had put them, without being able to find them, but added, that he thought they were somewhere in his possession, but that he had not searched in any other place than the box:-Held, that enough had not been done to let in secondary evidence of the contents of the letters. Bligh v. Wellesley. 400

3. Evidence of reasonable suspicion of felony may be given in mitigation of da- 1. Action for false imprisonment by a masmages, in an action of false imprisonment. Chinn v. Morris.

l. In assumpsit on an attorney's bill, where the charges are for business done for two persons, partners, if one only is sued, and there is no plea in abatement, the other may be called as a witness for the plaintiff. Fawcett v. Wrathall.

5. The Judges will not in general admit an . accomplice as king's evidence, though applied to for that purpose in the usual way by the counsel for the prosecution, if it appear that such accomplice is charged with any other felony than that on the trial of which he is to be a wit-

6. If a prisoner in jail on a charge of felony ask the turnkey of the jail to put a letter into the post for him, and after his promising to do so the prisoner give him a letter addressed to his father; and the 2. If three defendants have jointly impriturnkey, instead of putting it into the post, transmit it to the prosecutor, this letter is admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained. Rex v. Derrington.

7. On an indictment for a larceny, if the prosecutor rests his case on the prisoner's recent possession of the goods, and the prisoner call a witness to prove that he (the prisoner) bought them of J. &, if the prosecutor call J. S., he can only ask him to such matters as go to negative the prisoner's case, and cannot prove by him that he saw the prisoner commit the theft. Rex v. Stimpson.

8. If the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt, the Judge will leave the whole of the conflicting statements to the Jury for their consideration; but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the Judge will direct an acquittal. Rex v. Jones.

EXECUTION.

See Shrrive, 1.

EXECUTOR.

See STATUTE OF LIMITATIONS, 1.-WITmuse, 5.—Thouse, 3.

FABRICATION OF SHARES.

See JOINT-STOCK COMPANY, 3.

FALSE IMPRISONMENT.

See BROTHER, 1.

ter of a man of war against his captain. The defendant pleaded two sets of pleas. The first set stated that he imprisoned the plaintiff in order to bring him to a court martial for disobedience of his orders, quarrelling, &c. The second set averred, that the imprisonment took place in consequence of charges brought against the plaintiff by a superior officer. The sentence of a court martial held to investigate the charges is not receivable in evidence on this state of the pleadings; but to make it so, it should be pleaded as an estoppel; and it is open to the Jury, if they believe that the imprisonment took place on the charges stated in the first set of pleas, to inquire into the truth of those charges, notwithstanding the decision of the court martial upon them. Hannaford v. Hunn.

soned the plaintiff, the declaration of one of the defendants, made three weeks after, in the absence of the others, tending to show that the imprisonment arose from malice, is admissible in evidence in an action for false imprisonment brought against all the three. Wright v. Court.

3. If in an action for false imprisonment two of the defendants are acquitted, because they were constables, and the senue was not laid in the proper county, another defendant is not entitled to be acquitted as acting in their aid, if in his plea he state that he, "as owner of a certain house, and the other defendants as constables acting in his aid, took the plaintiff, &c." Bond v. Rust.

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4. If a party be turning towards the wall in the street at night for a particular occasion, a watchman is not justified in collaring him to prevent his so doing. Booth v. Hanley.

5. If a constable tell a person given into his charge, that he must go with him before a magistrate, and such person in consequence goes quietly, without any force being used by the constable, it is a sufficient imprisonment to support an action of trespass. Chian v. Morris. 361

- If a reasonable charge of felony be made against a person, who is given in charge to a constable, the constable is bound to take him, and will be justified in so doing, although the charge may turn out to be unfounded. If a person be taken by a private individual without warrant, on suspicion of felony, and will not tell his name, and otherwise conducts himself so as to excite suspicion; this only goes in mitigation of damages, if it turn out that no felony was committed. The stat. 3 Geo. 4, c. 55, s. 21, which relates to the apprehension of reputed thieves without warrant, only extends to persons generally reputed to be thieves, and not to persons suspected of a particular theft. Cowles v. Dunbar.
- If A. imprison B., and in continuation of that imprisonment A. deliver B. to the charge of C., who keeps B. in custody, the acts and declarations of C. are evidence against A. in an action for false imprisonment. Powell v. Hodgetts. 432
- 8. In an action for false imprisonment, the defendant justified under the 1 Geo. 4, c. 56, (commonly called the petty trespass act.) as the owner of land on which the plaintiff was trespassing. It was held that to make out his justification, he must give positive proof of actual damage being done, so as to enable the Jury to decide on the quantum of it; and that the Jury were not to presume damage from the mere fact of a trespass being committed.—Semble, that the principle of this decision will apply to the substituted provisions of the 7 & 8 Geo. 4, c. 30, the above act of 1 Geo. 4, having been wholly repealed by the 7 & 8 Geo. 4, c. 27. Buller v. Turley.

FALSE REPRESENTATION.

If the declaration state that the defendant falsely represented that in his public house "his returns had averaged, and then averaged 300% a month"—this allegation is proved by evidence that he said he was "doing 300% a month in the house"—the fact that he named his brewer, and kept a pass-book of his beer and spirits, and that the plaintiffs neither inquired of the brewer nor asked for the pass-book, do not go in bar of the action, but are fit matter for the consideration of the Jury on the question whether the defendant practised a fraud and deceit on the plaintiffs. Bouring v. Stevens.

FALSE RETURN.

See WRIT, 1.

FELONY.

See Debt, 1.—Indictment, 2.—Forger, 1

FELONIOUS TAKING.

See Horse-straling, 1.

FEME SOLE.

See HUSBAND AND WIFE, 5.

FINE.

A fine being levied "of twelve messuages, &c., and twenty acres of land," if it appear that there are nineteen houses on the conusor's land in that place, this is such an ambiguity in the fine as to let in parol evidence to show what part of the property was meant to be included in the fine, though the whole of the land the conusor had was under twenty acres. Denn d. Bulkeley v. Wilford, 173, Addenda, iii.

FLEET PRISON.

See DAY RULE, 1.

FORCIBLE ENTRY OR DETAINER.

To constitute a forcible entry or forcible detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer should be with such numbers of persons and show of force as is calculated to deter the rightful owner from sending the persons away, and resuming his own possession. Miner v. Maclem.

FORFEITURE.

See EJECTMENT, 1.

 To support an ejectment on a forfeiture of a lease by non-performance of a covenant, if the covenant be to do an act, the lessor of the plaintiff must give some evidence of the omission of the act; and if the covenant be for payment of rent, the lessor of the plaintiff must prove a demand of such rent. Doe d. Chandless

v. Robson. If, on the trial of an ejectment against the assignee of a tenant, on a forfeiture of a lease by breach of covenant, it appear that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he oughtthe landlord cannot recover, though the covenants be actually broken, and there be neither release nor a dispensation on the part of the landlord. Doe d. Knight v. Rowe.

FOREIGN STATE.

If a foreign state is recognized by this It a person purchases an article, and sufcountry, it is not necessary, to support an allegation which describes it as a state, to prove that it is in fact an existing state; but if it be not so recognized, then such proof becomes necessary, and may be admitted. If a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have courts of justice, that is evidence of their being a state, and it makes no difference whether they formerly belonged to another country or not, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in oppo-sition to it. Yrisarri v. Clement. 223

2. A foreigner has no right to negotiate in England a loan for the use of a state which has separated itself from, and is at war with one of England's allies, (such state not being at the time recognized by England,) without the permission of the English government; and if a letter in an English newspaper merely animadvert, though in the strongest terms, upon the illegality of such a transaction, it is no libel: otherwise, if it go beyond that, and impute a moral fraud to the party engaged in it.

3. If in the inducement in a declaration in an action for a libel, two places are described as "states," and in the libel itself allusion is made to one, and the other is actually mentioned under the title of a "neighboring state," it is not necessary that the plaintiff, at the trial should prove that either of them were in fact states

FORGERY.

If a second uttering be made the subject If a thief go to an inn, and intending to of a distinct indictment, it cannot be given in evidence to show a guilty know-ledge in a former uttering. Rex v. Smith. 633

> FRAUD. See COVENANT, 1.

FRAUDS, STATUTE OF.

See Publication in Numbers, 1.

A mother took her son to school, and saw the master, but no evidence was given of what passed at that time. Afterwards, a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable: Held, that the statute of frauds did not apply, and it was proper to leave it to the Jury to say, under those circumstances, whether the original credit was not given to the uncle. Darnell v. Tratt.

GOODS RETURNED.

fers it to remain on his premises for two months, without examination, and then finds it to be unfit for use, he cannot, after that length of time, avail himself of the objection in answer to an action for the price, unless some deceit has been practised with regard to the article. Percioal v. Blake.

HEALTH.

See NUISANCE, 2.

HORSE.

See WARRARTT, 1, 2, 3, 4.

HORSE-RACE.

If, to qualify a horse to start for a certain stake, it should have been regularly hunted with the hounds of Sir T. M., it is not necessary that the horse should have been hunted every day the hounds went out, but once hunting with those hounds is not sufficient. If a race be advertised to take place under certain conditions, the stake-holder cannot waive any of the conditions without the consent of the whole of the subscribers; and if the plaintiff's horse was disqualified, as not being within the description of horses that were to run, he cannot recover back his original share of the stake, if he was aware of the disqualification, and was Weller v. guilty of a misrepresentation. 618 Deakins.

HORSE-STEALING.

steal a horse, direct the ostler to bring out his horse, pointing to that of the prosecutor, and the ostler at his desire lead out the horse for the prisoner to mountthis is a sufficient taking by the prisoner to support an indictment for horse-stealing. Rex v. Pitman.

HUSBAND AND WIFE.

See LARCHET, 1

- 1. If a wife quits her husband's house under a fair apprehension of personal violence, that is equivalent to her husband's turning her out of doors; and improper restraint of her person in a mad-house is, for this purpose, personal violence; and therefore a party supplying her with necessaries may recover for them against the husband. If she quits her husband's house because he brought a common woman to reside in it, that is also a sufficient reason for her going; and if the husband is sued for necessaries supplied to her, it is no answer to the action, that she had committed adultery previous to the credit being given, if the husband did not know it till after the credit; nor that, after the credit, she obtained a decree for alimony, which alimony was to relate back to a period before the credit. Houliston v. Smyth.
- 2. If, to rebut the presumption that a wife lest her husband's house from his cruel treatment of her, letters written by her to her husband in affectionate terms are offered in evidence, it must be proved at what time they were written, or they are not admissible in evidence: and the dates of them are not sufficient proof of the times at which they were written. S. C.
- 3. The minute-book of the Consistorial Court is sufficient evidence of a decree for alimony pronounced in that Court, without such decree being drawn up in form. S. C.
- 4. If a husband and wife are living together, and business is carried on in the house in which they live, though the wife's name only appears in the purchase of goods, in the parish rates, and in a contract with the parish officers, yet the husband, partaking of the profits of senting to the dealings, is liable in an action for goods delivered at their house for the purposes of this trade, though the bills of parcels are headed in the wife's name. Petty v. Anderson. 38
- 5. If a feme sole is carrying on a trade, and, before her marriage, conveys her "stock in trade, furniture, and other articles belonging to her in and about the said business," to a trustee for her separate use, and then marries, such property is not liable to be taken in execution for the debts of her husband, though some of the articles have been disposed of, and stead. Dean v. Brown. 62. Addenda i.
- 6. If a tradesman bring an action against a husband for goods furnished to his wife while she was living apart from her Vol. XII.-101

husband, it is for him (the tradesman) to show, that her so living proceeded from some cause which would justify it. Maintoaring v. Leslie.

IDIOT.

See BROTHER, 1.

INDICTMENT.

See Addition, 1.—Brother, 1.—Evidence, 5.—Joint-Stock Company, 3.—Nuisance, 2, 3.—Prejury, 1.

1. It is no objection to evidence on an indictment for felony, that it also goes to show the prisoner guilty of another felony. Rex v. Moore.

An indictment charging that a prisoner "did feloniously and maliciously, with intent to extort money, charge and accuse A. B. with having committed the horrible and detestable crime, &c., and feloniously, &c., menace and threaten to prosecute the said A. B., &cc." is not good under the stat. 4 Geo. 4, c. 54, s. 5. But if the indictment follow the statute, and the evidence be of a threat to prosecute, the Judge will leave it to the jury to say whether that was not a threatening to accuse. Rex v. Abgood.

INITIAL.

See SIGNATURE, 1.

INSOLVENT.

See Assigner, 1.

1. The provisional assignee of the Insolvent Debtors' Court may maintain ejectment for the property of the insolvent, notwithstanding the provisions of the 1 Geo. 4, c. 119, and the 3 Geo. 4, c. 123. Doe d. Clark v. Spencer.

- the trade, and being aware of, and as- 3. If an insolvent in his schedule describe a bill of exchange as in the hands of D_{-} that is sufficient to discharge him from his liability, though D. may have indorsed it over. And if he state it in his schedule as drawn by himself on M. whereas it was drawn by M. on him, it will be for the jury to say, whether they are satisfied that the same bill was meant, and whether, if it were, they think the misdescription was by mistake, or meant to mislead any one; for if they think the same bill was meant, and that the misdescription was by mistake, it is a good discharge. Nias v. Nicholson. 120 others purchased for her use in their 3. An insolvent debtor is not a competent witness for the plaintiff in an action by his assignee to recover a sum due for
 - work done by him before his insolvency. Wilkins v. Ford.

4. The interest of an insolvent debtor in premises held by him from year to year, under an agreement for a lease, passes by the assignment to the provisional assignee, so as to prevent the insolvent from maintaining ejectment against his tenant with respect to the same, notwithstanding no act has been done by 3. such provisional assignee, to show his acceptance or his refusal of the lease. Doe d. Palmer v. Andrewes.

INSURANCE.

One of the conditions in a policy of insurance from fire stated, that if any difference should arise on any claim, it - should be immediately submitted to arbitration, and after directing how the arbitrators should be chosen, added, that no compensation should be payable until after an award determining the amount thereof should be duly made.—It was held, that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover any thing, and did not merely question the amount of da-mage. Goldstone v. Osborn. 550

JOINT-STUCK COMPANY.

See PROMISSORY NOTE. 2.

1. If persons connect themselves with a company of this description, they are every one of them liable to pay the demands upon it. Keasley v. Codd. 408 2. A company formed for the purpose of

- making a railway, one of the regulations of which was, that 15,000 shares of 50L each should be raised, and then that application should be made to Parliament, and which, after continuing for rather more than a year, was dissolved, because no eligible line of road could be found, is not an illegal company under the act 6 Geo. 1, c. 18, so as that a party who has bought shares may on that account recover back the money for them: but if the party who has sold shares has not complied with a regulation of the company, stating that all transfers, to be valid, must be approved by a committee, -so that this transfer to him was not a legal transfer,-a person who has purchased of him may recover the money paid, on the ground that the consideration has failed, though ne use here the scrip receipts he received. Kemphas failed, though he did not tender back son v. Saunders.
- See also Maudeley v. Le Blanc.

2. If a person who is the inventor of a scheme get gentlemen to act as a committee, with intention of forming a joint- 1. If a man and woman be indicted for a stock company to carry it into effect, and

he himself act as secretary to the committee, he cannot maintain an action against one of the committee for his services as such secretary, or for his trouble, or for journeys he undertakes in furtherance of the execution of the scheme. Parkin v. Fry. If persons conspire to fabricate shares in addition to the limited number of which a joint-stock company, according to its rules, consists, in order to sell them as good shares, they may be indicted for it, notwithstanding any imperfection in the original formation of the company. Whether scrip receipts, given by the bankers of such a company in return for sums paid as deposits, can be properly described as shares in the indictment, quere. Rez v. Mott.

JUDGMENT.

See Court, 1.

JURY, SPECIAL.

Where a case turned solely on a question of law, and there was no fact in dispute between the parties, the Lord Chief Justice refused to certify for the special jury. Wemys v. Greenwood.

KING'S EVIDENCE.

See EVIDENCE, 5.

LANDLORD AND TENANT.

See ALLEGATION, 2.

A. makes an agreement with B. for the sale of premises, at the time in the possession of C., under an agreement for four years, (three of which have expired,) and undertakes to B. that he will do such repairs as are left undone by C. at the expiration of his (C.'s) tenancy. B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair.—Semble, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy created by the agreement between A. and C. If the declaration in an action by B. against A. aver that C. did not leave the premises in good repair at the expiration of his tenancy, the agreement between A. and C. need not be produced to prove such averment. Goodson v. Gouldsmith.

LARCENY.

See EVIDENCE, 7.

larceny, the latter as a single woman, it

is not sufficient to entitle her to an acquittal on the ground of coercion, to prove both jointly committed the offence, and that she had lived with the man for two years, and was reputed his wife—but such evidence must be given as to satisfy the Jury, that the prisoners are in fact married persons, though it is not absolutely necessary to prove the actual marriage of the parties. Rex v. Hassall.

 If the only evidence against a prisoner indicted for larceny be, that the goods were found in his possession sixteen months after they had been stolen, the Judge will direct an acquittal, without calling on him for his defence. Rex v.

LEASE.

See Assience, 1. — Bankbuft, 16. — Forpeiture, 1.

LETTERS.

See Evidence, 1, 2, 6.—Libel, 3.—Signature, 1.

LIBEL.

See FOREIGN STATE, 1, 3.

- In an action for a libel in a review, it is sufficient to set out the contents of an index, (referring to the article in the body of the review,) which is of itself a libel, and no reference need be made to the article itself, if the index contains per se, prima facie, libellous matter.—Buckingham v. Murray.
- 2. If in a libel asterisks be put instead of the name of the party libelled, to make it actionable, it is sufficient that the party should be so designated, that those who know the plaintiff may understand that he is the person meaut; and it is not necessary that all the world should understand it. But if witnesses, who state that they understand that the plaintiff is the person, also say that they were enabled so to understand by the perusal of another libel, with which the defendant had no concern, their evidence ought to be laid out of the case. Bourke v. Warren.
- 3. If a letter, set out as inducement, be alleged to contain "the words and matter following," and when the letter is read in evidence, it is found to contain all that is stated in the declaration and something more, this is no variance.
- 4. A circular by the secretary of a society for the protection of trade against swindlers and sharpers, stating that the plaintiff is considered an improper person to be proposed to be ballotted for as a member of that society, meaning thereby, that

the plaintiff is a sharper and swindler, is a libel; and if the jury are satisfied that that imputation is made, it is a libel, however cautiously the paper may be worded. Goldstein v. Foss. 252

But, on a defect in the declaration, the judgment was arrested. Addenda iii. If on the trial of an indictment for publishing an obscene snuff-box, a witness prove that the defendant exhibited to him the box produced on the trial—or, a box exactly similar—this is not sufficient, if the witness cannot identify it as the very box exhibited to him. Semble—That a count charging the defendant with having an obscene libel in his possession, with intent to publish it, is not good. Rex v. Rosenstein.

- 6. In an action on the case for a libel in a newspaper, the plaintiff cannot give evidence of the contents of a placard posted in the window of a third person, although the placard states what will appear in the desendant's newspaper respecting the plaintiff, and that which is foretold does appear accordingly. Raikes v. Richards.
- 7. Semble—that in an action for a libel, evidence of facts which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification, which were on the record, have been withdrawn before the trial, and the plaintiff in consequence is not prepared with evidence to answer the defendant's proof. A witness, who has given evidence on his examination in chief as to the truth of a libel, may be asked on his cross-examination whether the MS. of the libel was not written by him, and he is bound to answer the question. v. Chapman.

LIGHT.

 To constitute an illegal obstruction, by building, of the plaintiff's ancient lights; it is not sufficient that the plaintiff has less light than he had before: but there must be such a privation of light as will render the occupation of his house uncomfortable, and prevent him, if in trade, from carrying on his business as beneficially as he had previously done. Back v. Stacey.

LOAN.

See Foreign State, 2.

LODGINGS.

See District, 1, 2

 If a party lets lodgings to an immodest woman, to enable her to consort with the other sex, he cannot recover in an action for the lodging so supplied; but if the

woman merely lodges there, and receives her visitors elsewhere, he may. Apple-347 ton v. Campbell.

LUNATIC.

1. A person who in 1823 was found a lunatic from 1809, is liable for necessaries suitable to his degree furnished to him in the year 1819, he at that time acting in all the ordinary affairs of life; if it appear that he had been imposed upon, it might be otherwise. Baxter v. Earl of 178 Portsmouth.

2. Whether a person can set up his own lunacy-Quere. Ibid.

MAGISTRATE.

See Notice, 1.

Semble—Proof that a man acts as a magistrate is proof of his being so; but if he never acted as such, you must produce the commission, because you can have no other evidence. Snow v. Peacock. 215

MAIMING CATTLE.

Injuring a sheep by setting a dog at it, is not such a maining or wounding as is within the stat. 4 Geo. 4, c. 54, s. 2. Rex v. Hughes. 420

MALICIOUSLY ARRESTING AND HOLDING TO BAIL.

See ARREST, 1.

1. An action lies for maliciously holding a party to bail, although he is never arrested, but is told that there is a writ out against him, and he goes to the sheriff's officer and gives bail. Small v. Grey.

2. Form of declaring.

MARKET.

605

Ibid.

Semble-That the owner of a market can maintain no action against a person selling in the street near the market, if he allows the area of the market to be partly used for purposes unconnected with the market, although there may be sufficient room left in the market, especially if no notice was given to the defendant that there was room for him to sell in the In an action for mesne profits, the judgmarket. Prince v. Lewis, 66, Addenda ii.

MERGER

See Dant, 1.

MARRIAGE.

See LARCENY, 1.

1. In an action by a lady for a breach of promise of marriage, it is not necessary,

for the purpose of making out the mutual promises, which are necessary to support the action, that the plaintiff by works consented to accept the defendant: but the jury may infer such consent from the circumstances of her making no objection at the time of the offer, and her afterwards receiving visits from the defendant in the capacity of a suitor. Daniel v. Bowler.

To support an action for a breach of promise of marriage, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff and a refusal by the de-But if the plaintiff's father fendant. went to the defendant, and asked him if he intended to fulfil his engagements to his daughter, and he replied certainly not; proof of this will be sufficient, Gough v. Farr.

MASTER AND SERVANT.

1. If an agreement be entered into for the employment of a clerk for four years, from the 1st of January, 1823, at a salary of 400l. a year, and the clerk be paid up to the first of January, 1825; and in July, 1825, the clerk is dismissed from his employment, he may commence an action in Michaelmas Term, 1825, though at that time, according to the agreement, a year's salary would not be due. Pageni v. Gandolfi. 370

2. If a clerk be engaged at a salary of 100/ a year, and have received his wages up to a certain time, and serve for some time longer, and then leaves the service before the year expires, without due cause and without any notice;-whether he is entitled to recover wages up to the time of his quitting - Quere. At all events, he is liable to a cross action for leaving the service without notice. Huttman v. Boulnois.

3. The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent receiving a salary of 500L a year. Beeston v. Collyer.

MESNE PROFITS.

ment in ejectment is conclusive of the plaintiff's right to the premises from the day of the demise laid in the declaration in ejectment, but is no proof of the defendant's possession at that time. The consent rule admits the possession at the time of the service of the declaration in ejectment; but if the plaintiff intends to go for profits antecedent to that time, he must give distinct evidence of the defendant's possession. Dodwell v. Gibbs. 615

MILLER.

- 1. If the miller to a vendor of corn receive an order from such vendor to deliver a quantity of flour to the vendee, and actually deliver a part under several suborders from the agent of the vendee, and asterwards refuse to deliver the remainder on the ground of his having no more of the vendor's flour in his possession; the vendee may maintain trover against him, and will not be put to bring a special action of assumpsit on an implied promise to deliver the whole. Smith v. Cook.
- 2. Where goods have been sold by a miller, under circumstances which give him the right of refusing to deliver them, evidence of the insolvent state of the buyer's circumstances cannot be received in an action of trover, brought by the indorsee of the bill of lading against the wharfingers of the miller, unless such 2. evidence can be prought nowledge of the plaintiff. Holliday v. 509

MONEY HAD AND RECEIVED.

See BANKBUPT, 13.

The brokers to certain ship owners charged their employers certain sums of money for work done to their ships, under the head of stevedore. The labor of a stevedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the ship owners were aware that the brokers charged them more than they paid the workmen, but made no objection on account of their zeal and diligence: Held, that one of the workmen, under such circumstances, could not maintain an action for the larger sums received by the brokers, as money had and received Wilson v. Cohen. to his use.

MORTGAGE OF A SHIP.

If the brokers to the mortgagee of a ship, 3. If by a private act of Parliament, all who has taken possession, receive the freight, it is not recoverable from them in an action of assumpsit by the assignees of the mortgagor, (he having become a bankrupt,) if a sum equal in amount has been applied by the mortgagee to the payment of the seamen's wages. 387 v. M. Ghie.

NEGLIGENCE.

In an action on the case against an attorney for negligence, if the declaration state that the plaintiff retained him to see if a certain security were good, and that he accepted the retainer and neglected his duty, and represented the security to be good, and that the plaintiff advanced his money, and that the security was bad. by means of which the plaintiff lost the interest, the gist of the action is the negligence; and therefore the statute of limitations runs from the time of the negligence, and not from the time of the loss of the interest. Howell v. Young. 238

NOTICE.

See PRACTICE, 6.—CHECK, 2.—BILL OF EX-CHANGE, 3, 7.—BANK NOTES, 4.

276 1. A notice of action to a magistrate signed by a firm of two attorneys, who are partners, and employed by the plaintiff, is good. And if it be signed T. & W. A. W., this is good, though the Christian name of one is T. A., and of the other W. A., if there was no other firm of the same surname. James v. Swift. A notice of set-off can only be given with

the plea of the general issue. If there be any other plea besides the general issue, the set-off must be pleaded. Webber v. Venn. 310

3. If notice of disputing an act of bankruptcy be served on the clerk of the assignee at his counting house, that is a good service of it. Widger v. Browning.

NONSUIT.

See REPLEVIE, 1.

NUISANCE.

 If a party set up a noxious trade remote from habitations and public roads, and after that new houses are built and new roads constructed near it; the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads. Rex v. Cross. 483

363 2. To support an indictment for a nuisance. it is not necessary that the smells produced by it should be injurious to health; it is sufficient if they be offensive to the senses. Rex v. Neil

houses for the slaughtering of horses within one thousand yards of a certain workhouse, are to be deemed public nuisances and removed; but if they existed before the act, the owners are to receive a compensation: Held, that if an indictment be framed at common law with counts on that act, the defendant may be convicted; and if he so carried on the trade as to be in fact a public nuisance, he is not then entitled to any compensation. Rex v. Watte.

OFFICE.

See COVENANT, 1.

ONUS PROBANDL .400 HUSBAND AND WIFE, 6.

OUTLAWRY.

See PRACTICE, 3, 4.

OWNER, REPUTED. See BANKBUPT, 16.

PARISH.

On the question whether a place is parcel of a certain parish; old entries made by a churchwarden in a book, by which he does not charge himself, but in which he | 7. If a party recover damages in case merely makes statements relative to repairs, &c., done to a chapel in the parish church, alleged to belong to the place in question, are not evidence. Cooke (Esq) v. Banks.

PARTICULAR OF DEMAND.

If the declaration is on a bill of exchange and for goods sold, and a particular of demand is obtained under a Judge's order, the plaintiff may recover on the bill, though it is not mentioned in his particular of demand. Cooper v. Amos. 267

PARTNER.

See Evidence, 4.—Persunt, 1.

- 1. An indorsee of a bill of exchange cannot recover against the acceptors of a bill, accepted by one who was formerly 2. A patent reciting that the invention is a partner, if such person had ceased to be a partner at the time of the accepting of the bill, even though the bill was accepted for a partnership debt, unless the person still held himself out to the world as a partner, as if he allowed his name to remain on the door of the house of business, or the like. Dolman v. Orchard. 104
- .. If one of the partners gave notice to a witness that they had ceased to be partners, that might be evidence for the defendants; but a conversation between the witness and one of the defendants, in which he so stated, is clearly not.
- 3. Held, that the indorsee for value of a bill of exchange cannot maintain an action on a bill accepted by one partner in a transaction not relating to the partner-ship, against a secret partner; because such secret partner had neither privity of interest in the bill, not being accepted in a partnership transaction; nor was the bill taken on his credit, as he was not known to be a partner. Lloyd v. Ashby. 138

4. Both of two partners are liable for gas furnished, if they have both had the use

of it, though the lease of the wharf upon which it is supplied is granted only to one of them. The City of London Gas Light and Coke Company v. Nicholls. 363 5. If money be lent to one of two partners

who says he borrows it for the firm, and he misapply it, and there be proof that the plaintiff lent it under circumstances of negligence and out of the ordinary course of business, he cannot recover against the other partner. Loyd v. Front-

6. If money be lent to one partner on his individual credit, the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its repayment.

against one of two joint coach proprietors, for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his coproprietor for contribution, if he prove at the trial that he was not personally present when the accident happened Wooley v. Batte.

PATENT.

1. On sci. fa. to repeal a patent for a machine, on the ground that it is not new, you may, to prove that, put into the hand of a witness who had constructed a machine for the same purposes, a drawing, not made by himself, and ask him whether he has such a recollection of the machine he made as to be able to say that that is a correct drawing of it Rex v. Hadden.

for producing a certain effect with a machine, and that his machine will make paper of all widths, from one to twelve feet, cannot be supported if no one machine will produce this effect. Bloram Addenda vi v. Elec.

PERJURY.

- 1. If A. be indicted for perjury in swearing that he did not enter into a verbal agreement with B. and C., for them to become joint dealers and co-partners in the trade and business of druggists; and it appear in fact that B. was a druggist, keeping a shop with which A. had nothing to do; but that A. and C. being sworn brokers could not trade, and therefore made speculations in drugs in B.'s name, with his consent, he agreeing to divide profit and loss with A. and C., this will not support the indictment, as this is not the sort of partnership denied by B. upon oath. Rex v. Tucker. 2. If an indictment for perjury charge that
 - the defendant falsely swore to certain facts, and the deposition appear to be joint, and that his wife first deposes to

the facts, and then the defendant swear that he is sure that A. B. is one of the persons who assaulted, &c., this is no variance, as it is sufficient for the indictment to state the substance of what the defendant swore. Rex v. Grindall.

PLEADING.

See Allegation.—Autherois Acquit. FALSE IMPRISONMENT, 1.—WARRANTY, 4.

- 1. To support a plea that the trustees under a private act of Parliament did not allow or permit the defendant to have the exclusive privilege of collecting dust and ashes in a certain place, it is necessary to prove some positive act of obstruction on their part; and it is not enough to prove that a third party took them away, having a right to do so. Townson v. 110 Green.
- 2. And it seems that this is no answer to an action on a written contract, to pay a certain sum for the dust of a parish, but the party must seek relief in equity. Ibid.
- 3. An averment of a tender of a bail-bond for execution, is not proved by evidence of the sheriff's officer going to the defendant and asking him to sign the bail-bond, no bond being produced, he having none with him, and his assistant only having some blank bonds in his pocket, which he always carried. Jarmain v. Algar.
- 4. Form of a count for maliciously holding to bail, where there has been no arrest. Small v. Gray.

POSSESSION.

See LARCENY, 2

PRACTICE.

See Juny, (Special,) 1 .- Notice, 2 .- Puis DARRIEN CONTINUANCE, 1.—TRIAL, 1, 2.

1. Scire facias on a forfeited recognizance. Mode of proceeding. Rex v. Wiblin.

2. A plaintiff may be nonsuited after a plea of tender. Anderson v. Shaw.

- 3. If a plaintiff in a writ of error to reverse an outlawry, has assigned as error, that he was beyond sea when the exigent was awarded, and the defendant in error plead that "he left the realm of his fraud and covin, and to defeat him of his just debt, and for the purpose of avoiding the outlawry," and on this plea issue be taken: at the trial the defendant in error begins. Bryan v. Wagstoff
- 125, *Addenda* ii. 4. If on the trial it appear that a suit was commenced against him by original, and 2. If before sending goods by a carrier, the instead of giving bail he evades the officer, and goes abroad, this is evidence to induce the jury to presume that he

went out of the country to avoid outlaw ry; because he must be supposed to consider, that, if he is so sued, and does not appear, an outlawry will follow. But if the proceeding against him had been by bill, it would be otherwise. Ibid.

5. Whether the plea of the defendant be good in law—Quere. Ibid.

6. If a party to a cause is abroad, but em-

- ploys an attorney to conduct it, he will be presumed to have left in the hands of that attorney all papers material to the cause; and therefore, if on the 13th of December, between the hours of five and six in the afternoon, notice is given to his attorney to produce a paper material to the cause, and the trial comes on on the 15th of December, this notice to produce is sufficient; and if the paper be not produced, the other party may give secondary evidence of its contents. S. C.
- 7. After the plaintiff has closed his case, the learned Judge will generally allow him to adduce fresh evidence to obviate objections, which are beside the justice of the case, but not to get rid of any difficulty on the merits. In actions by the assignees of bankrupts, if the commission issued between the 2d of March and the 1st of September, the formal proofs in support of the commission must be made out by parol evidence of the trading, act of bankruptcy, &c., whether notice of disputing them has been given or not. Semble, that evidence of the mere fact of a bankrupt having drawn or indorsed a bill for 100%, and of that bill being over due in the hands of a holder, is not sufficient proof of a petitioning creditor's debt, without proof of a default in the acceptor. Giles v. Powell.

PRESUMPTION.

See Evidence, 1 .- Suduction, 1.

PRINCIPAL AND AGENT.

See Carrier, 4.

- 1. If an agent employed to sell coals make a bargain in his own name with a tradesman, to furnish him with coals on credit, for which in return he is to receive goods or credit, and the coals and the goods be both delivered, the real seller of the coals may recover the price of the tradesman, if his name be in the ticket sent with the coals as the seller; because the tradesman. after that, is bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal. Pratt v. Willey.
- sender applies at his wharf to know at what price certain goods will be carried, and he is told 2s. 6d. per cwt., by a clerk

who is transacting the business there, and on the faith of this he sends the goods: the carrier cannot charge more, although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates, in which 3s. 6d. per cwt. was set down for goods of the sort in question. Winkfield v. Packington. 599

question. Winkfield v. Packington. 599
3. If a person employed by the administrator of a deceased debtor, to wind up the concerns of the deceased's business, give an undertaking to a creditor of the deceased, to furnish money to meet an acceptance which such creditor has given, in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt.

Maud v. Waterhouse.

PRINTER.

A printer cannot recover against the publisher for printing a work, which contains the life of a prostitute and the history of her amours with various persons, and it is no answer that the parties are in pari delicto. Poplett v. Stockdale. 198

PRISONER.

See DAY RULE, 1.

PRIVILEGED COMMUNICATIONS. See WITHES, 2.

PRIZE FIGHT.

1. All persons present countenancing a prize fight are guilty of an offence. Rex v. Billingham. 234

2. When a prize fight is expected, the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they refuse to enter into securities, to commit them.

1bid.

PROHIBITED GOODS.

See Contraband, 1.

PROMISE OF MARRIAGE, BREACH OF.

See MARRIAGE.

PROMISSORY NOTE.

 The declarations of a former holder of a promissory note, payable on demand, made while he was the holder, are not evidence for the defendant in an action by a subsequent holder, unless the note had been presented for payment before such declarations were made. Barongs v. White.

2. Certain persons, directors of a company, borrowed of certain bankers, for the use of the company, 2000L, for which they gave a joint and several note. Shortly after, at a meeting of the directors, at which one of them was not present, half the money was paid off, and a joint promissory note drawn, to which the signstures of all the directors were obtained. This note, on being tendered to the bankers, was refused; upon which the secretary to the company, who had no general authority, consulted with two of the directors, neither of them being the one who did not attend the meeting, and with their permission added to the note the words jointly and severally:-Held, in an action on the note by the bankers against such one director, that he was not liable, though on being written to for payment, his only reply was, " that from the death of a relation he could not then attend to the subject, but would give it his earliest attention:"-Held also, in the same case, that such one director was not liable upon the original consideration, though he was present when the money was borrowed, it appearing that one of the plaintings, the firm being composed of three, was an original holder of shares which had been afterwards sold, and the produce of them paid to another of the plaintiffs. Perring (Bart.) v. Hone. 401

PROMOTIONS, 293, 641.

PROOF.

See Allegation, 1.—Ejectment, 2.—Libert, 2, 5.—Seduction, 1.—Will, 1.—Word.

PROSTITUTION.

See Bond, 1.-Lodeines, 1

PUBLICATION IN NUMBERS.

If a party agrees to take a work which is to be published in eighteen numbers, a intervals of two months; and after receiving several numbers, refuses to take any more, and also to pay for those which he has had; an action will lie for the price of the latter, and the statute of frauds does not apply, though the original contract was not to be executed with in a year, for the law in such case will imply a further contract to pay for each number as it is delivered. Masor v. Pyse.

PUBLIC HOUSE.

- 1. In assumpsit on an agreement to transfer a public house, and assign the licenses, the parties binding themselves in a penalty for the performance of the terms; if the vendor could not assign the licenses, and the vendee had not the money ready at an appointment to settle the business, the penalty cannot be recovered; but if the vendee has paid the deposit, it may be recovered back. Clarke v. King.
- 2. A check upon a brewer's house is not sufficient in such a case if tendered in payment, though it be proved to be the constant practice to use checks instead of money, in order to prevent robbery, on account of the lateness of the hour at which settlements take place in the transfer of public houses.

PUIS DARRIEN CONTINUANCE.

A plea " puis darrien continuance" may be received at Nisi Prius on paper, and need not be transcribed on parchment. Myers
Toulor. 306 v. Taylor.

RACE.

See Honsu-Race.

RECEIPT.

See JOINT-STOCK COMPANY, 3.—STANP, 1, 2.

A paper in the form of a receipt, if it is not given in evidence as a receipt, does not require a stamp. Brookes v. Davies. 186

RECEIPT OF THE MASTER OF A SHIP.

See TROVER, 2.

RECEIVER OF STOLEN SECURITIES FOR MONEY.

A receiver of stolen securities for money is not punishable as an accessory to the felony under the stat. 3 Geo. 4, c. 24. It is considered that, from its inaccuracy, no conviction can take place on that sta- In trespass for seducing the plaintiff's niece tute. Rez v. King. 412 But see the stat. 7 and 8 Geo. 4, c. 29.

RECOGNIZANCE.

If a recognizance be estreated at the Quarter Sessions, and a writ issue to the sheriff to levy under the stat. 3 Geo. 4, c. 46, and the sheriff levy the amount; the Court of Quarter Sessions has the power to mitigate the amount, although the money has been actually levied, and the sheriff must pay back the difference to Vol. XII.-102 8 . 2

the party.—Whether on such a levy the sheriff is entitled to poundage-Quere. Haynes v. Hayton.

REGISTRY OF DEEDS.

An examined copy of the registration of a deed, in the registry of the county of Middlesex, is admissible as secondary evidence of its contents. Doe d. Ubele v. Kilner,

RENT.

See Double Rent, 1.—Seeriff, 1, 2.

REPAIRS.

See AGREEMENT, 3.

REPLEVIN.

In replevin, if the defendant avow for rent in arrear, and the plaintiff replies non tenuit, on which issue is joined; if the plaintiff does not appear by himself or his counsel to open the pleadings, he may be nonsuited, though it is the defendant's record. Symes v. Larby.

SCHOOLMASTER.

See Frauds, Statute of, 1.

SCRIP RECEIPTS.

See JOINT-STOCK COMPANY, 2.

SEARCH WARRANT.

See BANKRUPT, 15.

SECRETARY.

See JOINT-STOOK COMPANY, 3.

SECURITIES.

See Enbezelement, 1.

SEDUCTION.

and servant, per quod servitium amisit. evidence that the party seduced (being about sixteen years of age) occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master and servant between the uncle and niece; and such relation is not destroyed by the circumstance of the niece being entitled on her coming of age to a sum of nearly 500%, of which the interest is applied in the mean time for her benefit. Proof in such case that the niece, after her seduc-

tion and abandonment by the defendant, returned to her uncle's house, where she continued some time in a state of great agitation, and received medical attendance, and was obliged to be watched lest she should do herself some injury, is sufficient to raise the presumption of that loss of service by the uncle which is necessary to maintain the action. Manuell v. Thomson. 303

SERJEANTS' INN, FLEET STREET.

The occupiers of houses in Serjeants' Inn, Fleet Street, are not liable to pay poor's rates to the parish of St. Dunstan in the 391 West. King v. Butterworth.

SERVICE OF NOTICE.

See Notice, 3.

SERVICE, LOSS OF.

See SEDUCTION.

If the plaintiff's son, who was in fact his servant, in delivering parcels from a stage coach, receive an injury by which the father is deprived of his services, the father is not entitled, as part of the damages in an action for the loss of his son's service, to have a compensation for the injury done to his parental feelings. Flemington v. Smithers.

SET-OFF.

See APPRENTICE, 1.—Notice, 3.

SHARES.

See JOINT-STOCK COMPANY, 3.

SHERIFF.

See WRIT, 1.

- 1. If the attorney for an execution creditor, on being informed of a claim by the landlord, for rent, direct the sheriff's officer to withdraw the execution, and he do so, and the plaintiff sue out a ca. sa. for the debt, such execution creditor cannot bring an action against the sheriff, for falsely returning to the fi. fa. that so much rent was due, and he will not be entitled to recover, though he show that the supposed landlord had not a right to 3. If by some mistake of a ship's manifest, the rent claimed, and that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was. Stuart v. Whittaker.
- 2. If an agreement for the assignment of a piece of ground, on payment of a sum of 1260L, contain a clause that the party

agreeing to take the assignment shall pay and allow at the rate of 1001 per annum, from the time of taking possession, till the completion of the purchase, in equal half-yearly payments, a sheriff, on a writ of fs. fa., has a right, under such clause, to treat the 100% as rent, and deduct it out of the proceeds of the execution. Saunders v. Musgrave, 294, Addenda, iz. (Bart.)

3. Trespass does not lie against a sheriff to recover damages for the seizure of property by his bailiff, under a writ of leven facias issued on a suit in the county court, because the sheriff is, in such case, a judicial and not a ministerial officer. Tinsley v. Nassau. 582

4. A sheriff's officer may recover the usual caption fees, notwithstanding the stat 23 H. 6, c. 9. Townsend v. Carpenter. 118

SHIP.

See DEMURRAGE.--MONEY HAD AND ES-CRIVED, 1 .- MORTGAGE OF SEIP. 1.

- 1. If in a case where (there being no charter party) the captain of a ship delivers the cargo, and as the best thing he can do for all parties, under the existing circumstances, takes a bill of the agent of the persons to whom the cargo on board belongs, for the amount of the freight: this does not discharge the owners of the cargo, but they are liable for the freight, if the bill be dishonored; but if it appear that he might have had his money of the agent, and chose to take the bill, it is otherwise. Strong v. Hart.
- By a charter party, on a voyage from Liverpool to the West Indies, and from thence to London or Liverpool, it is agreed, that a brig "shall be made, and during the voyage kept tight, staunch, &c., at the owner's expense, and that the freighter shall pay freight at the rate of 2004 per month, for any time (beyond six months) that she may be employed, the pay to commence from the day of sailing, till her arrival into dock at the homeward port of discharge." The vessel was obliged to remain twenty-eight days at St. Domingo, for the purposes of repair, the repairs being done at the expense of the owner: — Held, that during those twenty-eight days the vessel was conployed by the freighter, within the terms of the charter party. Ripley v. Sonife. 132
 - a suit is commenced in a foreign port against the captain, for a supposed surreptitious landing of a part of his cargo, by which he is delayed in prosecuting his voyage, there being no suit against the ship: This is not a loss on which the underwriters on the ship are liable. Bradford v. Levy.

4. If one execute a ship's articles, to serve 2. A receipt for 521. 10s. requires only a on board as an able seaman, at certain wages, and when on board act as a cuddy servant, if there be no express agreement that he shall receive separate wages as a cuddy servant, he can maintain no action against the captain for wages in that capacity. there were an express agreement,-Quære. Dafter v. Cresnoell.

SIGNATURE.

A person, after he became a bankrupt, and before he had got his certificate, called at the office of his attorney, to whom he was indebted, and wrote there (the attorney not being at home) a letter 5. promising to pay him a sum of 100%. The only signature was a flourish of the pen, which, it was contended by the plaintiff, formed the letter M., the initial letter of the defendant's name: Held, that if it was an M. it was not a sufficient signature under the statute 6 Geo. 4, c. 16, s. 131. Semble, that if such a letter be without date, the time it was written cannot be proved by parol evidence. Hubert v. Moreau. 528

SLANDER

See Allegation, 3.

- 1. Action lies against a person for saying of an inn and tavern keeper, " you are a pauper, and will be in the bankrupt list in less than twelve months;" and it is not necessary to support an action for words spoken of a man in his trade, that his trade should be averred in the declaration to be such a one as will make him liable to the bankrupt laws. And proof at the trial that he has once sold spirits to be consumed out of his house is sufficient proof of his being a trader. Whittington v Gladwin.
- 2. In an action for slanderous words charging a baker with selling adulterated flour. if the declaration alleges as special damage, that several persons (naming them) discontinued to take his bread: the person of whom they used to buy it, cannot be asked what reason they gave for ceasing to take it any longer, but the persons themselves must be called to prove their motives. Tilk v. Parsons. 201

STAMP.

See AGREEMENT, 1 .- BILL OF EXCHANGE, 1, 5.—COVENANT, 2.—RECEIPT, 1.

1. A receipt given by the stage manager of a theatre, " in satisfaction of all my claims for the last season," does not require the stamp of a receipt in full of all demands. Dibdin v Morrie.

stamp for that amount, though it mentions 100% paid before.

3. A bond for foreign stock, signed in Paris, but issued in England, does not require an English stamp. Yrisarri v. Cle-

Whether he could, if 4. If an instrument has been originally unstamped, but has been stamped on payment of the penalty, it is admissible in evidence, though the receipt for the penalty has been erased, provided it be proved that such receipt had been indorsed on it. It is not necessary to prove the commissioner's signature to such a The Apothecaries' Company v. receipt Fernyhough.

- When it is objected that an agreement, which bears a 11. stamp, is inadmissible, because it contains more than one thousand and eighty words, the counsel making the objection must be prepared with a witness who can prove that he has counted the words, and can positively state their number. The receipt for the penalty put on an agreement at the stamp office, when it is stamped there on payment of the penalty, is not to be reckoned in counting, whether the agreement "with every receipt, &c., indorsed thereon," contains one thousand and eighty words, though the agreement cannot be read unless such receipt for the penalty is indorsed on it. Bowring v. Stevens. 337
- 6 If parties enter into a written agreement, which is duly stamped, and indorse new terms on it, varying the former agreement, such new terms will not be admissible in evidence without a fresh stamp; and as the entering into new terms put an end to the original agreement, the plaintiff cannot proceed upon that; and although there be counts in the declaration framed on each agreement, the plaintiff must be nonsuited. Reed v. Deere. 624

STATUTE OF FRAUDS.

See Acceptance, 1.—Statute of Limita-TIONS, 1.

promise by a party to execute a bailbond on a writ to be sued out against A. B., in consideration of the plaintiff's forbearing to arrest A. B. on a writ already sued out, is not a promise to answer for the debt, &cc., of another, under the 4th section of the statute of frauds. Jarmain 249 v Algar.

STATUTE OF LIMITATIONS.

See NEGLIGENCE, 1.

A person borrowed a sum of money in the year 1807: in the year 1815 he stated by parol to the attorney of the party entitled

to it, that he had made provision by his will, and had directed his executors to pay it at his death. He died in the year 1825, without having made any such provision:-Held, in an action against the executor, that the promise was good, and the money recoverable: that neither the statute of frauds nor the statute of limitations applied to the case: and that a moral obligation to pay was a sufficient consideration for the promise. Horton. 383

STOLEN GOODS.

If a party has good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, without having done every thing in his power to bring the thief to justice. Gimson v. Woodfull.

STOPPING IN TRANSITU.

See CARRIER. 1.

If trover is brought, and the intended defence is; that the defendant was the consignor of the goods, and had a right to stop them in transitu, and the plaintiff, in anticipation of this, set up that he bona fide bought the goods of such consignor before the stoppage in transitu-If it appear that the purchase by the plaintiff was by a written agreement, such agreement must be produced; and if it is not, the plaintiff will not be allowed to give other evidence of his buying the goods. Brain v. Harden.

SUBSCRIPTION.

See CLUB-HOUSE, 1.

TENANCY, EXPIRATION OF.

See AGREMENT, 3.

TENDER.

1. If ten sovereigns are offered to a person, and he is told that he may "take those ten sovereigns in full of his demand," that is not a good tender. Cheminant v. Thornton.

2. Semble, that a tender must be taken to be made on the behalf of the person who

owes the money.

3. If a person put down a sum of money, and the plaintiff offer to take it in part, and the defendant will not allow him to do so, saying that no more is owing-This is not a good tender, because a person tendering money should tender it without making any terms, and leaving it open for one party to say that more 1. Trespass, and not case, is the proper was due, and to the other that the sum

tendered was sufficient. Peaceck v. Dich-

If a third person, present at an interview between plaintiff and defendant, when defendant was willing to pay 10L, offer to go up stairs and fetch that sum, but is prevented by the plaintiff's saying he cannot take it-such offer is a good tender; and though the defendant did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act. Harding v. Davies.

TESTATOR.

See WILL, 2.

THREATENING TO PROSECUTE

See Indictment, 2.

TIMBER.

Two persons were indicted on the 6 Geo. 3, c. 36, for lopping and topping an ash timber tree, without the consent of the owner. The owner died before the trial, having first given orders for the apprehension of the prisoners on suspicion. The offence was committed at eleven o'clock at night, and the prisoners, when detected, ran away. The land-steward of the owner proved, that he had not given any consent, and did not believe that his master had :- Held, that this was evidence from which the jury might infer that no consent had been given by the owner. Rex v. Hazy and Collins. Note.—This statute is now repealed, and other provisions substituted by the stats. 7 & 8 Geo. 4, c. 29 & 30.

TITHES.

1. The time when the tithe of potatoes becomes the property of the parson is when they are dug up and laid in heaps, and not when they are "boughed out," while remaining in the ground. (Clerk) v. Hancock.

Evidence is admissible in an action for tithes on stat. 37 Hen. 8, of the fact of some of the parishes in London paying at the rate mentioned in the decree made by virtue of that statute, in order to raise a presumption that such a decree had been enrolled, no entry of such enrol-ment being to be found: a copy of the decree annexed to the statute, in a printed copy obtained from the king's printer, being produced. Macdougall v. Young.

TOMBSTONE.

form of action for taking away a tomb-

Stone from a churchyard, and obliterating an inscription made upon it. Spooner v Brewster. 34

2. After a man's return from transportation, he may maintain trespass for injury done to a tombstone erected by his wife during his absence.

TRADE.

See Nuisance, 1, 3.—Wond.

If one allow another to trade in his own name, and as carrying on the business for himself, a payment to such person is a good bar to an action by the person so allowing him to trade; and for goods sold in the trade, the person so carrying it on may recover, unless the person for whom it is carried on assert his or her own right to the sum due. Gardiner v. Davis. 49

TRANSITU, STOPPING IN.

See Stopping in Transitu.

TRESPASS.

See False Imprisonment, 9 .- Tomb-STORE. 1. 2.

TRIAL.

- 1. A Judge at Nisi Prius will put off, on sufficient cause, a trial, on application by a plaintiff, till the next sittings, if it be in Term, or for a few days, if it be after the Term, but if longer delay be required, the plaintiff can only obtain it by withdrawing the record. Curtis v. Barker.
- 2. If, at the assizes, a prisoner is tried for a misdemeanor under the commission of jail delivery, and during the trial becomes ill, and is obliged to be assisted out of Court, the Judge will discharge the jury; and the consent of his counsel that the trial shall proceed in his absence, is not sufficient to authorise the trial to proceed. If the prisoner recover during the assize he may be tried, the whole of the proceedings of the trial being commenced de novo. Rex v. Streek.

TROVER.

See BANK NOTES .- BILL OF EXCHANGE, 2, 3.—Delivery Order,—Miller, 2.

1. The servant of the defendant, a coachspring maker, received a spring of the plaintiff's to repair, and promised to bring it back by a certain hour. The defendant after that refused to return it without being first paid for the repair:-Held, If in an action of covenant, the declaration not a sufficient conversion to support trover. The action, if any will lie, should

be special assumpsit. Fairman v. Grim-

Where the master of a ship gives a receipt for goods put on board, it behoves him not to sign a bill of lading till that receipt is given up. If such a receipt is in the hands of the consignor, who, after the failure of the consignee, demands the goods, and the captain refuse to deliver them, alleging as his reason that he has signed a bill of lading to the consignee, this is a conversion, though the consignor did not tender either the freight or a compensation for the trouble of loading; and the fact that one of the consignors said to one of the consignees after the failure, that he was sorry for it, but would do as the other creditors did, will not make it less a conversion if that conversation was unknown to the captain. However, if the captain, instead of assigning the reason he did for the nondelivery, had said, "the goods are now on board, and I must take them to their destination," that would have been no conversion. The fact that the ship is named by the consignee, makes no difference as to a stoppage in transitu. Thompson v. Trail.

 If A. has in his possession a box con-taining papers belonging to a person de-ceased, and send the box with its contents to his solicitors, with directions to deliver the box and papers to the executor on his giving an inventory of them and a receipt: -Held, that trover lies against the solicitors, if they refuse to deliver the box and papers to the executor, he refusing to give an inventory and receipt, although the solicitors offered to give them up if the executor would give an inventory and receipt. Cobbett v. Chutton. 471

A father gave his son a watch, some printed books, and several articles of wearing apparel :- Held, that though the son was under age, (viz. about sixteen years old,) the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son. Hunter v. Westbrook.

5. In an action of trover for goods, the party who sold them to the plaintiff, on an understanding that if they were not paid for they were to be returned, is a com-petent witness for the plaintiff, although he has not been paid, and the plaintiff's succeeding in the action will enable him to have them back. Banks v. Kain. 597

VARIANCE.

See Libbl, 3.

state that the deed was made between the plaintiff of the first part, J. C. of the second part, and A. B. of the third. And the deed when produced appear on the face of it to be by the plaintiff, as trustee of J. C., of the first part, G. C. of the second, and A. B. of the third part, and the deed be executed by G. C. This is a fatal variance, although the breaches assigned do not in any way affect the party who is intended to be described as of the second part. Mayelston v. Palmerston, (Lord.)

VENDOR,

See Acceptance, 1.

USE AND OCCUPATION.

If a person let apartments for a year to a tenant, who occupies them part of the year, for which he pays, and then quits, and the party letting suffer another to occupy on an agreement also for a year, so that the first tenant could not, if he had wished, have obtained possession, such second letting is a rescinding of the first contract, so as to prevent any rent being recovered under it. Walls v. Atcheson. 268

USURY.

If a bond be given for the repayment of money, with interest at 5l. per cent., proof that the obligee has received interest at 7½ per cent. will not avoid the bond, unless the jury are satisfied that it was agreed, at or before the execution of the bond, that more than 5l. per cent. should be paid. Fussil v. Brookes. 318

WAREHOUSE.

See CARRIER, 2.

Corn sent to a factor for sale, and deposited in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself. Matthias v. Mesnard.

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WARRANT OF ATTORNEY.

If A. owe B. a sum of money, e. g. 4000l., and give a warrant of attorney to confess judgment for that sum, and after that dealings and payments take place between them, to an amount of 2000l. on each side of the account, but no payment made specifically in discharge of the warrant of attorney, the creditor may enforce it, though subsequently to its date he received a larger sum than it was given for; as, if it was not specifically paid in discharge of the warrant of attorney, the creditor might put it in

reduction of which of the two accounts he chose. Wooley v. Jennings. 144

WARRANTY.

1. If a general warranty of a horse be proved by parol, (the written contract for the sale not being forthcoming,) the fact that the witnesses who proved it saw a notice-board on the seller's premises requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the Jury for them to say, whether this formed asy part of the original contract. Best v. Obborne.

2. If the owner of a horse sold by a stable keeper with a warranty go to the buyer and request to have the horse back, stating, that he did not authorize the warranty of soundness, and the buyer refuse to give it up, saying, I know nothing of you; I bought the horse of Mr. O.; such refusal is not a waiver of the warranty.

3. In an action on the warranty of a horse, letters passing between the plaintiff and defendant, in which the plaintiff writes, "you will remember that you represented the horse to me as a five-year old," &c., to which the defendant answers, "the horse is as I represented it," are sufficient evidence from which the Jury may infer that a warranty was given at the time of the sale; and it is not necessary to give other proof of what actually passed when the contract was made. Salmon v. Ward.

4. In an action for a breach of an express warranty, that a horse was quiet, if the declaration allege that the defendant well knew him to be unquiet, this is an un necessary averment, and need not be proved. Gresham v. Postam. 540

WEST INDIA DOCKS.

In an action of trover brought against the treasurer of the West India Dock Company for refusing to deliver articles deposited in the West India Docks, he is entitled to the protection of the Dock Act, which requires, that actions for any thing done in pursuance, or under color of that act, should be brought within three months; and the circumstance of his having taken a bond of indemnity, is not a waiver of such protection. Sellict v. Smith.

WHALE FISHERY.

By the usage of the whale fishery, a fish is to be considered as a fast fish, which is attached by any means (such as the entanglement of the line round it, &c.) to the boat of the first striker, though the harpoon does not continue in the body of

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the fish—and this is a more reasonable usage than that mentioned in a note to the case of Fennings v. Lord Grenville, in Taunt. p. 243. Hogarth v. Jackson.

WHARF AND WHARFINGER. See DISTRISS, 2.—MILLER, 2.

WILL.

1. It is no objection to a will more than thirty years old being read in evidence, that possession has not followed it-because the Court cannot know how the will directs the possession to go, till it is 4. made acquainted with the contents of the will by its being read. If in the year 1794, the present defendant in ejectment obtained a verdict for the premises in question, and the present lessor of the plaintiff (who was neither a party to that trial nor claiming under any one who trial, and go on to show that the verdict then proceeded on improper evidence; after this the now defendant may give evidence of what deceased witnesses proved at that trial, with a view of showing that that verdict was a correct one. Doe d. Lloyd v. Passingham.

2. To constitute a good attestation of a will of lands, it is not necessary that the testator should actually see the witnesses sign the attestation. It is sufficient if he were in such a situation that he might see them attest his will. If on the evidence it appear that the testator was too weak to get out of bed, and it be doubtful whether the attestation was signed in the room in which he was, or in the next room, the door being open, it will be for the jury to say whether the will was attested, either in the same room, or in such a part of the next room that the testator might see them sign the attestation; in either of those cases the attestation is good. But if the jury should think that the attestation was signed by the witnesses at a part of the next room, where the testator could not see them, that is not a good attestation, notwithstanding the door between the two rooms was open, and the testator might hear what the witnesses said in the next room, if they spoke in the ordinary tone of voice. Tod v. The Earl of Winchelsea. 488

WITNESS.

See Attorney, 5.—Deed, 1.—Insolvent, 3.
—Will, 2.

 If goods were sold on commission by the defendant abroad, on an action for not accounting, the defendant's agent in London is a competent witness for the plaintiffs, though he has accepted a bill for the price of them, which is lying dishonored in the hands of the plaintiffs.

Martineau v. Woodland.

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595 2. The rule respecting privileged communications extends to an attorney's clerk, as well as to the attorney himself. Taylor v. Forster.

3. A witness has no right to refresh his memory with a copy of a paper made by himself, six months after he wrote the original, though the original is proved to be so covered with figures that it is unintelligible, the original paper having been written near the time of the transaction. Jones v. Stroud.

Whether a witness called on behalf of a plaintiff, to prove an agreement, who admits, on his cross-examination, that the signature to the agreement is his and not the plaintiff's, can be asked whether he signed it on behalf of the plaintiff and as his agent—Quære. Poplett v. Stockdale.

was so) introduce what passed at that 5. Assumpeit for mourning, against an exertial, and go on to show that the verdict then proceeded on improper evidence; after this the now defendant may give evidence of what deceased witnesses proved at that trial, with a view of showing that that verdict was a correct one. Doe d. Lloyd v. Passingham.

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6. In an action on a bill of exchange by the second indorsee, against the drawer; the first indorsee is a competent witness for the plaintiff. Hewitt v. Thompson. 372

If a witness is called, and refreshes his
memory as to the numbers of bank notes
by an entry in a book, the counsel of the
opposite party may cross-examine as to
the other parts of that entry. Loyd v.
Freshfield.

8. If in assumpsit for work and labor, the defence be that A. B. was employed to do the work, and not the plaintiff, A. B. is a competent witness to prove this, although he is an uncertificated bankrupt, and his assignees have received the amount due for this very work, as done by him. Wilson v. Gallatly. 467

9. If the counsel for the defendant in cross-examination put a paper into the witness's hand, to refresh his memory, the opposite counsel has a right to look at it without being bound to read it in evidence; and the opposite counsel may also ask the witness when it was written, without being bound to put it in. Rez v. Ramsden. 603

WORD.

If a word has acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting that trade; but that the word has acquired that particular meaning must be distinctly proved. Taylor v. Briggs.

WRIT.

In an action for a false return of nulla bona to a fi. fa., if the plaintiff show the debtor to be possessed of certain goods, it is no defence for the sheriff to show a prior execution to an amount of greater value, if to that execution the sheriff also returned nulla bona: nor. if the sheriff has the proceeds of the goods in his hands, is it any defence to show that the ft. fa., on the return of which the action is brought, was delivered at the sheriff's office at a quarter past five o'clock on the day on which it is returnable. Towne v. Crowder, (Esq.)

WRIT OF RIGHT.

1. On the trial of a writ of right, the four knights who return the grand assize must themselves attend and sit with twelve of the jurors whom they return, a jury of sixteen so constituted being by law required for the trial; and any sixteen of the assize are not sufficient. Tooth v. Bagwell.

2. On an affidavit of particular circumstances, such as the great age and expected death of witnesses, the Court will depart from their general rule not to try a writ of right in an issuable Term. Ibid.

3. If it appear on the day appointed for the trial, that one of the four knights is so 2. But if he has received letters from the ill, that he not only cannot then attend, but is not likely to be able to attend on a

future day, the Court will order the sheriff to summon another knight to act in his stead; and it will not be necessary , that any fresh selection of a grand assize should be made by the knights in consequence of the alteration which has taken place in their body.

4. On the trial of a writ of right, though the demi-mark has been tendered, the tenant must begin. The demi-mark may be tendered either at the joining of the mise, or at the swearing of the grand assize; and if it has been done at the joining of the mise, it is too late at the time of trial for the complainant to take the objection. Tooth v. Bagwell.

An examined copy of an answer in Chancery by a person not a party to the action is evidence, and it is not necessary to produce the original, or prove the handwriting of the party.

WRITING, HAND.

- 1. If a person proves that he has never seen the defendant write, and has never corresponded with him, but has seen papers in the master's office, which the attorney of the party admitted to be of his handwriting, and the person has acted on these papers so admitted-This is not such a knowledge of the party's handwriting, as will enable the person to prove a written document, alleged to be in his handwriting. Greaves v. Hunter.
- party, and acted on them, that will be sufficient. Sharpe v. Gisburne.





